86-1587 ①

Supreme Court, U.S.
FILED
MAR 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court
OF THE
United States

October Term, 1986

Joseph Toussaint, et al.,
Petitioners,
vs.
Daniel J. McCarthy,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a 1976 Three Judge District Court partial summary judgment decision and order in this case that was summarily affirmed by this Court in 1978 and has not been reversed or overruled by this Court may be vacated by a panel of the Ninth Circuit based upon the panel's reading of recent decisions of this Court in other cases?

2. Whether the Ninth Circuit properly vacated and modified the District Court's permanent injunction imposing procedural safeguards against arbitrary, unjustifiable and unnecessary confinement in lock-up at California's maximum security prisons at San Quentin and Folsom, and limited such procedural safeguards to requiring defendants to hold an informal nonadversary

placement hearing within a reasonable time after the inmate is segregated, to inform the inmate of the charges against him or the reasons for considering segregation, to allow the inmate to present his views, to conduct periodic review of the inmate's segregation status, and to base the decision to place or retain an inmate in lock-up on "some evidence", where the district court had found, without appellate reversal, (1) that the inmates enjoy a state created "liberty interest" in being free of confinement in lock-up, (2) that conditions in defendants' lock-up units have long violated Eighth Amendment minima, (3) that defendants have systematically failed and refused to cure these unconstitutional lock-up conditions and have retained inmates indeterminately in these unconstitutional lock-up conditions, frequently for years, (4) that defendants frequently place and retain inmates in the unconstitutional lock-up conditions unjustifiably and arbitrarily, on the basis of unreliable and undisclosed information, (5) that since 1976 the defendants have been subject to injunctions, affirmed by this Court or the Ninth Circuit, providing more substantial procedural protections for inmates than now required by the Ninth Circuit, and (6) that for a decade the defendants have persistently violated these injunctions which were designed to control unjustified, arbitrary and capricious placement and retention in lock-up?

LIST OF PARTIES

Plaintiffs-petitioners constitute a class of maximum security minimum privilege inmates in the custody of the Californis Department of Corrections (CDC) at the California State Prisons at San Quentin and Folsom (as well as at the California Training Facility at Soledad and the Dueul Vocational Institute (DVI)). The individual class representatives are Joseph Toussaint, Michael Cowans and Welve Johnson. Defendants-Respondants are Daniel McCarthy (Director, CDC), and the wardens and superintendents at the Prisons at San Quentin (Dan Vasquez) and at Folsom (Robert Borg) (as well as at Soledad (Alan A. Stagner) and DVI (Robert M. Rees).

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOSEPH TOUSSAINT, et al.,

Petitioners,

v.

DANIEL J. McCARTHY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners (plaintiffs below) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled prison conditions civil rights action.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 801 F.2d 1080. It is in the Appendix at 1. The Ninth Circuit's December 31, 1986 Order denying the plaintiffs' Petition for Rehearing Suggestion of Rehearing En Banc is unreported. It is in the Appendix at 585. That Court's Mandate and Judgment is in the Appendix at 586.

The principal decision and Judgment of the District Court giving rise to the instant proceedings is reported at 597 F.Supp. 1388. It is in the Appendix at 171. The Court's order denying defendants' Motion for New Trial is in the Appendix at ~~357.~~

The District Court Monitor's Sixth Review Memorandum and Order of March 19, 1985 (In Re Altamirano) is not reported.

It is in the Appendix at 383. The Monitor's Memorandum and Order Denying Request to Withdraw Sixth Review Memorandum (March 25, 1985) is not reported. It is in the Appendix at 376. The District Court's Minute Order of April 11, 1985 denying the Motion to review the Monitor's decision is not reported. Both it and an excerpt of the transcript of relevant proceedings are in the Appendix at 357. The Ninth Circuit's April 17, 1985 Order staying the Monitor's Sixth Review Memorandum, pending further briefing is in the Appendix at 370. The Ninth Circuit's May 22, 1985 Order vacating the stay in all but one respect is in the Appendix at 367. Mr. Justice Rehnquist's May 24, 1985 Order granting stay pending response is in the Appendix at 365. Justice

Rehnquist's June 4, 1985 Order vacating the stay is in the Appendix at 364.

The Monitor's April 11, 1985 Order Releasing Inmates from Segregation is not reported. It is included in the Appendix at 372. The District Court's June 13, 1985 Order affirming the above described order in all but one respect is in the Appendix at 362. The District Court's June 27, 1985 Order denying defendants' motion for reconsideration is in the Appendix at 359. The Ninth Circuit's Order granting a Stay of the District Court's June 13, 1985 Order is in the Appendix at 358.

The Three-Judge District Court's 1976 Opinion granting partial summary judgment and issuing an injunction is reported at 462 F.Supp. 397. It is in the Appendix at 549. The 1978 decision of this Court (over jurisdictional grounds dissent of Justice Rehnquist, J. and Burger, CJ.) is reported at 434 U.S. 1052. It is in the Appendix at 540.

The District Court's 1983 Decision issuing a preliminary injunction is reported at 553 F.Supp. 1365. It is in the Appendix at 435. The Ninth Circuit's 1984 decision, affirming the preliminary injunction in all but one respect, is reported at 722 F.2d 1490. It is in the Appendix at 408.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 30, 1986, affirming in part, reversing in part, vacating in part and modifying in part, judgments and Orders of the United States District Court for the Northern District of California dated September 30, 1976, January 14, 1983, October 18, 1984, April 11, 1985 and June 13, 1985, as well as other Orders derivative of these. Plaintiffs' timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied on December 31, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. Section 1983. These provisions are set forth in the Appendix at 587-588.

This case also involves certain provisions of California law, namely California Penal Code Sections 2931, 2933 and 15 Cal.Admin. Code Sections 3335, 3336, 3339. These provisions were included as appendices to the Ninth

Circuit's Opinion and are included in the Appendix hereto in that form at 147.

STATEMENT OF THE CASE

This Petition concerns approximately 2500 inmates at San Quentin and Folsom prisons who are confined in maximum security minimum privilege segregated housing units (lock-up). Plaintiff class members are isolated for long periods of time from the general prison population and spent an average of 22-1/2 hours per day locked in what the District Court recognized after trial as "dim, noisy, malodorous cubicle[s] the size of a dog kennel" with virtually nothing to do. See Toussaint v. McCarthy, 597 F.Supp.

1388, 1393 and 1403, quote at 1405-06 (N.D.Ca. 1984). (App. 171, 180-82, 233-35).[1]

The instant lawsuit was filed in 1973. In 1976, a Three-Judge District Court entered partial summary judgment sustaining plaintiffs' due process claims. The Court ordered that a lock-up inmate must be afforded prompt written notice of the reasons for his lock-up confinement, an opportunity to prepare a defense, a fair and expeditious hearing at which to present evidence, representation by a counsel-substitute

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1/ Additional class members are held in lock-up units at Soledad and DVI. The trial leading to the instant appellate proceedings concerned conditions only at San Quentin and Folsom and resulted in a permanent injunction concerning only those institutions. The Ninth Circuit's decision, however, affects the Soledad and DVI members of the class, as that Court vacated or modified other injunctions that apply to all four prisons.

when appropriate, and a written decision. Wright v. Enomoto, supra, 462 F.Supp. at 404-05 (App. 581-583). That decision was summarily affirmed by this Court. 434 U.S. 1052 (1978) (App. 540) (Rehnquist, J and Burger, CJ dissenting on jurisdictional grounds).

The District Court subsequently issued a preliminary injunction addressing cruel and unusual conditions in lock-up and reaffirming and strengthening the Wright procedural safeguards. Toussaint v. Rushen, 553 F.Supp. 1365, 1386-87 (N.D. Cal. 1983) (App. 435, 532-538).[2] The Court specifically found that the defendants had repeatedly violated the Wright requirements, continuing to place and retain prisoners arbitrarily and unjustifiably in lock-up. Id. at 1374-75 (App. 474-477). The Court identified a list of constitutional violations that resulted. Id. at 1374-76 (App. 474-483).

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[2] Prior to this the District Court had issued a preliminary injunction on January 14, 1983 (CD 513) that was vacated by the Ninth Circuit on the grounds that in the Ninth Circuit's view the District Court had applied an incorrect legal standard, involving a
(Footnote Continued)

The preliminary injunction addressed particular conditions of confinement and articulated criteria and standards to be followed by the defendants in making lock-up decisions, limited the use of "confidential" information to support lock-up decisions, required annual review

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(Footnote Continued)

totality of circumstances approach, in framing its order. Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981). This preliminary injunction initially applied only to San Quentin, Soledad and DVI. On August 3, 1983 it was extended to Folsom as well. (CD 664).

of any retention in lock-up, and established an evidentiary standard for retention in lock-up on grounds of gang membership. 553 F.Supp. at 1386-87 (App. 532-538).

A panel of the Ninth Circuit affirmed the preliminary injunction, with one minor exception involving food service. Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984) (App. 408). The Ninth Circuit considered the impact of this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), and reconfirmed the Wright Order. It also upheld the portions of the preliminary injunction requiring additional procedural safeguards for placement and retention in lock-up, stating that:

> The district court's order was a valid exercise of that court's power to effectuate the prior order of the three-judge court in Wright I. In fashioning a remedy for those violations the district court had

> the authority to go beyond earlier measures and enter a comprehensive order to insure against the risk of continued non-compliance. Yockey, 722 F.2d at 1494 (App. 425-427).

The Ninth Circuit's Yockey Panel observed that Hewitt "casts some doubt on the [district] court's conclusion that defendants' practices violate the fourteenth amendment...." Toussaint v. Yockey, supra, 722 F.2d at 1494, n. 6 (App. 426), and suggested that:

> in passing on plaintiffs' request for a permanent injunction the district court may wish to reconsider its evaluation of plaintiffs' procedural claims and, if necessary, decide whether the evidence continues to warrant imposition of the procedural requirements adopted to insure compliance with the Wright I court's injunction. Ibid. (App. 426-427).

Notwithstanding this observation, and citing Hutto v. Finney, 437 U.S. 678 (1978), the Ninth Circuit also recognized that the facts of this case might continue to warrant Wright I remedies or even additional procedural safeguards. 722 F.2d at 1494 (App. 425-427).

At the time of trial, concluded eight years after the Wright order was entered by the District Court, the situation had changed at San Quentin and Folsom but only for the worse. Evaluating the evidence introduced in the two month trial, the District Court found that the physical conditions in the segregation units at Folsom and San Quentin -- ranging from double celling in tiny cells to lack of sanitation to lack of exercise -- constituted cruel and unusual punishment in numerous particulars. Toussaint v. McCarthy, supra, 597 F.Supp. at 1395-1405 (App. 190-246).

In its permanent injunction the District Court ordered the defendants to cure specified cruel and unusual conditions. The District Court also carefully reconsidered the Wright and Toussaint v. Yockey lock-up placement and retention remedies within the context of this case, and then retained and amplified them. Toussaint v. McCarthy, 597 F.Supp. at 1415-18 (N.D. Cal. 1984) (App. 297-310). The Court also appointed a monitor as a special master under F.R. Civ. P., Rule 53, to oversee compliance. 597 F.Supp. at 1418-19 (App. 311-313).

Based on its review of all the evidence, the District Court concluded:

> If any facet of this case is more shocking than the physical conditions to which plaintiffs are subjected, it is the absolute capriciousness with which inmates are selected to suffer the grievous fate of assignment to segregation. 597 F.Supp. at 1415 (App. 297).

This conclusion was based on the facts proved at trial, that were not challenged by defendants on appeal nor disputed by the Ninth Circuit. These facts showed irrational lock-up placement and retention decisions being made on the basis of information that is wholly lacking any indicia of reliability.

In particular, the Court found, inter alia, that inmates were in fact locked-up, often for years on end, without any rational basis or justification at all, that the defendants' lock-up decisions often were in the nature of self fulfilling prophesies, and that the "confidential" information the defendants relied on to make lock-up decisions was generally untrustworthy and unreliable. See 597 F.Supp. at 1407 and nn. 34 and 35 (App. 251-255), where the District Court provided a detailed explanation with illustrations of these facts.

In addition, on the basis of overwhelming evidence that prison officials consistently refused to follow the District Court's prior orders, including the Wright and Toussaint v. Yockey injunctions governing lock-up procedures, the District Court found that the "prior order in Wright v. Enomoto has been consistently overlooked or disobeyed." 597 F.Supp. at 1418 (App. 310). Based upon all the evidence, the Court found that its prior orders to correct constitutional violations had not been effective. Id at 1418 (App. 310-311).[3/]

[3/] On the same day the District Court entered its permanent injunction, it also entered a judgment of contempt for willful violation at Folsom of the double celling provisions of the preliminary injunction. Toussaint v. McCarthy, 597 F.Supp. 1427 (N.D.Cal. 1984) (contempt). No appeal was taken from the contempt judgment. A second contempt conviction was subsequently avoided when the defendants stipulated to an order ending involuntary double celling at Soledad and DVI. (CD 1718, February 4, 1985.)

Defendants did not challenge these findings on appeal.

In view of defendants' long-continuing constitutional violations, defendants' consistent pattern of arbitrary decision-making and the defendants' failure to obey court orders, the District Court concluded that it could have ordered the segregation units closed immediately. 597 F.Supp. at 1418 (App. 310). However, the Court decided that closing the lock-up units would unduly jeopardize prison security. Thus, it permitted the defendants to house inmates in lock-up at San Quentin and Folsom while correcting the unconstituional conditions. Id. at 1418, 1419 n. 52 (App. 309, 316). To insure that inmates are not unnecessarily subjected to these cruel and unusual conditions, the District Court determined that, in the interim, it "must scrutinize the reasons assertedly justifying placement and retention of each inmate in segregation to ensure that they correspond to legitimate security considerations", and provided for the review of segregation decisions by its Monitor on this interim basis. Id. at 1418, 1425-26 (App. 309, 346-348).

Thus, in addition to ordering elimination of cruel and unusual conditions in the lock-up units, the District Court reaffirmed the Wright due process requirements. 597 F.Supp. at 1424 (App. 341-342). The District Court also mandated placement criteria and limited the use of confidential information to justify lock-up placement decisions. Id. at 1424-26 (App. 342-345). It also required at least annual review of any retention in lock-up, pursuant to the same processes and standards for placement. Id. at 1424 (App. 343-344). Finally, it provided for review by its Monitor and the Court of all segregation decisions disputed by the inmate concerned. Id. at 1424-27 (App. 350-352).

The defendants appealed from only a few provisions of the permanent injunction directly concerning conditions of confinement.4/ The defendants appealed generally from parts III and IV of the injunction, i.e., the lock-up placement and retention provisions of the

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4/ Defendants appealed from provisions involving control of hot water temperature in inmate showers, installation of sound absorbing materials, and law library-court access requirements as well as provisions, derived from the procedural safeguards, concerning programs for lock-up inmates.

permanent injunction.[5] 597 F.Supp. at 1424-1427 (App. 349-355). Plaintiffs cross appealed on a few points.[6]

In its September 30, 1986 decision, the Ninth Circuit held that in institutional or structural litigation the abuse of discretion standard of appellate review of a District Court's remedy was much relaxed "in favor of close appellate review." 801 F. 2d at 1089 (App. 20):

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[5] The Defendants also appealed from several subsequent court orders that specific inmates be released from lock-up to the general population. These orders and relevant limited appellate stay orders are set forth in the Appendix hereto at 358-407. They are described, supra at 2-4. The Ninth Circuit's decision concerning the procedural safeguards provisions of the permanent injunction rendered moot or subsumed these additional appeals. See, infra.

[6] Plaintiffs cross appealed from the law library-court access provisons, from the conclusion that the medical care system at Folsom did not violate the Constitution, from the conclusion that denial of contact visiting to long term lock-up inmates does not violate the Constitution, and from the conclusion that in the context of this case enforced idleness of lock-up inmates does not violate the Constitution.

> We will scrutinize the injunction closely to make sure that the remedy protects the plaintiff's constitutional rights and does not require more of state officials than is necessary to assure their compliance with the constitution. Within these parameters, we will defer to the district court.
> 801 F.2d at 1089 (App. 23).

Applying this standard, the Ninth Circuit vacated the three judge district decision in this case, in Wright v. Enomoto, supra (App. 549-584), and vacated virtually all of the court mandated lock-up procedures, even though it found that the inmates enjoy a liberty interest in not being wrongly assigned to a lock-up unit. 801 F.2d at 1097-1098

(App. 62-68).[7] The Ninth Circuit held that the underpinnings of Wright had been eroded both (1) by this Court's recent decision in Hewitt v. Helms, 459 U.S. 460 (1983) and (2) because the California administrative regulation upon which Wright was based has been repealed.[8]

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[7] The Ninth Circuit rejected defendants' appeal from provisions of the permanent injunction on correction of structural deficiencies, and law library-court access, rejected plaintiffs' cross appeal on contact visiting and enforced idleness, agreed with plaintiffs' cross appeal on law library-court access issues, and agreed in part with plaintiffs' cross appeal on the Folsom medical care system.

[8] The Ninth Circuit concluded that the Wright Court's holding that California had created a liberty interest in freedom from lock-up under 15 Cal.Admin. Code § 3330 is entitled to "no deference" because the regulation has been repealed. 801 F.2d at 1092 (App. 36). In their Petition for Rehearing and Suggestion of

(Footnote Continued)

In addressing the lock-up procedural protection issues, the Ninth Circuit also did not disturb the District Court's findings, inter alia, concerning the cruel and unusual conditions in the lock-up units or that defendants' lock-up assignment practices were arbitrary and often were based on wholly unreliable confidential information or that defendants' lock-up practices, procedures and decisions violated existing court orders. Moreover, it affirmed the

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(Footnote Continued)

Rehearing En Banc plaintiffs demonstrated that the operative requirements of Section 3330 remain in force. Plaintiffs' argument on this point in the Petition For Rehearing is included in Appendix hereto beginning at 590 (exclusive of appendices thereto). If a Writ of Ceriorari is issued, Plaintiffs would brief that point further, as well as other Ninth Circuit errors of California law bearing on plaintiffs' liberty interest in being free of lock-up.

District Court's formulation of appropriate standards to govern lock-up decisions. 801 F.2d at 1101-02 (App. 82-84).

Relying on Hewitt, the Ninth Circuit limited, however, the judicially mandated lock-up placement and retention remedy to requiring defendants to hold an informal nonadversary placement hearing within a reasonable time after the inmate is segregated, to inform the inmate of the charges against him or the reasons for considering segregation, to allow the inmate to present his views, and to conduct periodic review of an inmate's segregation status. The use of confidential information was specifically allowed. 801 F.2d at 1101 (App. 78-79). And relying on Superintendent Mass. Correctional Institution v. Hill, 472 U.S. ____, 86 L.Ed.2d 356 (1985) the

Ninth Circuit limited the standard of proof for and judicial review of lock-up decisions to "some evidence." 801 F.2d at 1105-06 (App. 99).

Plaintiffs filed a timely Petition for Rehearing Suggestion of Rehearing En Banc addressing the Ninth Circuit's decisions on lock-up procedures and remedies. That Petition was denied on December 31, 1986 (App. 585).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Raises Important Issues of "Law of the Case" and of the Significance of this Court's Summary Affirmances of Lower Court decisions, as The Ninth Circuit's Decision is in Direct Conflict with this Court's 1978 Summary Affirmance in this Case of the Three Judge District Court Wright Decision and Order, Which has Neither been Overruled Nor Questioned by this Court

In its September 30th decision, the Ninth Circuit held that the decision and order entered in Wright v. Enomoto, and summarily affirmed by this Court, 462 F.Supp. 397 (D.Md. 1976) (three Judge), sum aff'd 422 U.S. 1052 (1978) is no longer valid, and therefore is not entitled to "law of the case" application. 801 F.2d 1190-93 (App. 26-40).

Although this Court is not bound by its own decisions summarily affirming lower court rulings, a summary affirmance of the judgment of the lower court settles the issues for the parties to that case. Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, CJ concurring). More generally, it prevents any lower court from coming to the opposite conclusion in any other case on the issues presented and necessarily decided. Mandel v. Bradley, 432 U.S. 173, 176 (1977); Hicks v. Miranda, 422 U.S. 332, 342-343 (1975). Cf.

Whitehill v. Elkins, 258 F.Supp. 589, 598 (D.Md. 1966) (three Judge) (Sobeloff, CJ. concurring specially), rev'd 389 U.S. 54 (1967).

The summary affirmance at issue here was in the instant case. The defendants had appealed to this Court from the entire partial summary judgment and order of the Three-Judge District Court. Further, it appears from the dissent from this Court's summary affirmance that this Court reached the merits of the case. See Wright v. Enomoto, 434 U.S. 1052 (1978) (Rehnquist, J. and Burger, CJ. dissenting on jurisdictional grounds).

This Court's summary affirmance of Wright has not been overruled, nor has it ever been questioned by this Court. Indeed, in Hewitt v. Helms, 459 U.S. 460, 469 (1983), this Court explicitly acknowledged and did not overrule its decision in Wright. See Toussaint v. McCarthy, 801 F.2d at 1092, n. 10 (App. 37-38).[9/] In these circumstances, the Ninth Circuit's actions in this case raise important issues involving the "law of the case" doctrine and the significance of this Court's summary affirmance decisions that warrant issuance of a Writ of Certiorari.

[9/] Notably, eight members of the Supreme Court who considered Wright, including the two who dissented, were on the Court that issued Hewitt. Justice Rehnquist dissented on jurisdictional grounds from Wright and delivered the opinion of the Court in Hewitt. On June 4, 1985, acting as Circuit Justice, Justice Rehnquist denied defendants' request for a stay of the procedural safeguard provisions of the permanent injunction pending the instant appeal (App. 364).

II. The Ninth Circuit's Severe Limitation of the Procedural Protections the District Court May Require For Lock-up Inmates to those Specifically Mandate in Hewitt Raises Important Unresolved Questions of Law Concerning Such Protections and Conflicts With a Decision of the Eighth Circuit.

A. The Ninth Circuit's Decision in this Case Raises Important Issues of Law Not Resolved by this Court's Decisions in Hewitt and Hill.

The Ninth Circuit has created a per se rule that the quantum of due process required for administrative segregation, regardless of context, is limited to those protections specifically identified by this Court in Hewitt v. Helms, 459 U.S. 460 (1983). Yet, the facts and legal context of Hewitt (a pure Fourteenth Amendment Due Process case) are so markedly different from those involved in the instant case (an Eighth Amendment and Due Process case), that this Court should issue a Writ of

Certiorari to clarify application of Hewitt and its progeny.

Unlike many inmates here, Helms received notice of the reasons for his initial placement in segregation, less than 48 hours after his initial placement in segregation. Helms received a prompt hearing concerning his placement. There was no indication in the Hewitt record that Helms was illiterate or that the issues presented were particularly complex. Helms apparently had the right to present and to a degree to confront witnesses in the hearing that actually resulted in an adjudication of his guilt of the disciplinary offense and his sentencing to a term of segregation. And the Pennsylvania prison authorities, following the hearings in which it was decided to retain Helms in segregation, made adequate written statements of the reasons for their decision. 459 U.S. at 464-466. Further, Hewitt focused on confinement of a prisoner in conditions resembling segregation for a total of 50 days, based on his suspected participation in specific acts of serious misconduct. Ibid.

By contrast with the circumstances in Hewitt, the instant case involves, for example, confinement of hundreds of inmates in segregation for extended periods (often exceeding two to five years) on the basis of unreliable and undisclosed information for reasons often vague or unspecified and unrelated to the conduct of the inmate. Also by contrast with Hewitt, the conditions of confinement in the lock-up units at San Quentin and Folsom have for more than a decade grossly violated the Eighth Amendment. Toussaint 597 F.Supp.

at 1393-1405, 1408-20 (App. 178-246, 257-323). Further, procedural safeguards established in this case more than a decade ago (and sustained by this Court) "have been consistently overlooked or disobeyed" by the defendants. 597 F.Supp. at 1418 (App. 310). The additional procedural protections imposed by the *Toussaint* preliminary injunction (and sustained by the Ninth Circuit) were also disobeyed. *Id*. at 1407-08. (App. 255-257) Even more significantly, the evidence at trial in this case made clear that the procedural protections imposed in *Wright* and the *Toussaint* preliminary injunction do not adequately protect against unjustifiable, arbitrary and capricious lock-up decisions, *see id*. at 1405-07, 1415-16, 1418 (App. 246-255, 297-298, 308-310).

Examples abound of continued violations of the District Court's orders by the time of trial. Inmates continued to be placed in lock-up without timely notice or hearing. 597 F.Supp. at 1406 (App. 251). The notice often was not "in sufficient detail to enable the prisoner to prepare a response or defense." _Id_. at 1406-07 (App. 251). The lock-up hearings tended to be perfunctory. _Id_. at 1407 (App. 251). Even if a determination was favorable to the prisoner, he might be retained in lock-up for substantial periods due to lack of cell space in general population. _Id_. at 1407 (App. 255). Thus, unjustified and arbitrary confinement in lock-up remained commonplace. Id. at 1415-16 (App. 297-299).[10/]

Consideration of unconstitutional conditions in lock-up, duration of confinement in lock-up, a consistent pattern of unjustified and arbitrary lock-up decision making, and disobedience of court orders appear to remain relevant under Hewitt. See Hewitt v. Helms, 459 U.S. at 468; id. at 481 n. 4 (Stevens, J. dissenting). Plainly they are relevant under Hutto v. Finney,

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[10/] Moreover, in postjudgment proceedings before the Monitor, where numerous inmates challenged their retention in lock-up, defendants' documents evidenced a continued pattern and practice of violating both the Wright injunction and the Toussaint injunctions. Consequently, for example, the Monitor reported to the District Court that the "important procedural deficiencies cited in the District Court's Finding of Fact, 597 F.Supp. at 1406-07 ([App. 246-256)], continue." First Report of the Monitor (CD 1898).

437 U.S. 678 (1978), where the Court considered both violation of previous orders and long standing uncontitutional conditions in lock-up, as well as the duration of lock-up confinement (437 U.S. at 685-87) as justifying a district court in Arkansas to enter "a comprehensive order [including a limitation on the duration in which an inmate could be held in lock-up] to ensure against the risk of inadequate compliance." 437 U.S. at 687. *See also* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635, 694-95 (1982) (incorrectly relied upon by the Ninth Circuit. 801 F.2d at 1089 (App. 22-23)). *Cf*. *United States v. Paradise*, ____ U.S. _____, 55 U.S. L.Week 4211, 4217-18, 4220 (No. 85-999 Feb. 25, 1977); *id*. at 4221 (Powell, J.

concurring); id. at 4222-23 (Stevens, J. concurring).

Similarly, the Ninth Circuit's reliance on Superintendent of Mass. Correctional Institution v. Hill, 472 U.S.____, 86 L.Ed.2d 356 (1985), in fashioning its standard of proof for and judicial review of lock-up decisions (801 F.2d at 1103-06, App. 88-106), raises additional important questions that this Court should address. For like Hewitt, factually and legally Hill is inapposite to the instant case.

In Hill, this Court determined only what standard of proof is required by the Due Process Clause of the Fourteenth Amendment in the regular course of judicial review of a state administrative decision concerning an inmate's loss of good-time, and confinement to isolation for a fixed short term. Further, in Hill there was no evidence of a pattern of arbitrary decision-making, nor of long standing violations of the Eighth Amendment, nor of long-term confinement in lock-up, nor of repeated violations of past court orders.

As the Ninth Circuit held, plaintiffs have significant liberty interests in freedom from assignment to lock-up. 801 F.2d at 1097-98 (App. 60-68). In Hill this Court reaffirmed "the requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action." 86 L.Ed.2d at 364. Thus, even if this Court were to apply a due process analysis, the standard of proof and judicial review set forth in Hill (and the limited procedures mandated in Hewitt) do not necessarily apply to this case. Such a standard depends on context.

Unlike Hill (and Hewitt), the issue in this case is not simply what due process requires, but rather whether the extent of the District Court's authority in formulating a remedy for proven long standing violations of both the Eighth and Fourteenth Amendments to the Constitution and of previous court orders.

In this case, by contrast with Hill, the District Court found that defendants, in the face of the Wright order and the Toussaint preliminary injunction, continue to confine inmates unjustifiably, arbitrarily and capriciously in lock-up units, in which they are subjected to cruel and unusual punishment, "without evidence adequate to establish a reasonable belief that such inmates present a danger to others or a threat to the security of the institution," 597 F.Supp. at 1407 (App. 252). For example, the District Court found that defendants are not able to identify accurately which inmates are gang members (and subject to lock-up), but rather place and retain alleged gang members in lock-up based on "sketchy" documentation and "confidential information" from sources of "unproven reliability." 597 F.Supp. at 1407 (App. 253).

In this context, this Court should determine what standard of proof and judicial review of lock-up decisions is appropriate under both the Eighth and the Fourteenth Amendments, and a trial court's inherent powers to assure proper compliance with its orders. Hence a Writ of Certiorari should issue to clarify both Hill and Hewitt.

B. A Writ of Certiorari Should Issue to Resolve a Conflict Between the Ninth and Eighth Circuits as to Proper Application of this Court's Decision in Hewitt.

The Ninth Circuit's decision in this case also conflicts with a decision of the Eighth Circuit with respect to the extent of the procedural safeguards a district court may order when there exists a liberty interest in being free from lock-up. See Clark v. Brewer, 776 F.2d 226 (8th Cir. 1985), affirming and modifying, 578 F.Supp. 1501 (S.D.Iowa 1983).

In Clark, having considered and analyzed this Court's decision in Hewitt v. Helms, the Eighth Circuit upheld certain of the district court's placement and retention procedures that go significantly beyond those called for by *Hewitt*, in that inmates in *Clark* were assigned to "close management" status for indeterminate periods of time. 776 F.2d at 234-236.

In *Clark*, as in the instant case, the Eighth Circuit identified a liberty interest arising from defendant's administrative regulations. *Compare* *Clark*, 776 F.2d at 230-32 *with* *Toussaint*, 801 F.2d at 1100-01, 1105-06 (App. 78-83, 97-101). In *Clark* as in the instant case, but *not* in *Hewitt*, lock-up inmates suffered more than just the effect of being "merely transferred from one extremely restricted environment to or even more confined environment." 776 F.2d at 233, quoting *Hewitt*, 459 U.S. at 473. In *Clark* as here "at least in some instances an extended period of confinement may have some indirect impact on parole opportunities and on earning of good time credits" and "inmates in close management have less opportunity to participate in institutional programs." Clark, 776 F.2d at 233. Compare Toussaint, 801 F.2d at 1097-98 (App. 60-69) and 597 F.Supp. at 1405-07 (App. 243-256).

Beyond these similarities, the circumstances in Clark were not as detrimental to the inmates as those in the instant case. In Clark there was no evidence that long term conditions in close management were cruel and unusual or that many inmates are in lock-up for extremely long periods of time. Nor was there any evidence that the defendants persisted over many years in not curing unconstitutional conditions, in unjustifiably and arbitrarily placing inmates in lock-up on the basis of unreliable information and in violating court injunctions addressing both unconstitutional conditions and due process lock-up placement and retention requirements.

Recognizing the flexibility in due process requirements acknowledged in Hewitt, the Clark Court concluded that they vary depending upon circumstances. 476 F.2d at 232-33. In the circumstances before it, which were not as harsh as in the instant case, the Eighth Circuit favored "in general a relatively informal, nonadversarial procedure...." 776 F.2d at 233.

Even in the less compelling circumstances before it, the Eighth Circuit, by contrast with the Ninth Circuit here, sustained district court imposed procedural requirements that written notice be provided the "close management" inmates in four types of situations. 776 F.2d 234. Compare 801 F.2d at 1100-01 (App. 78-83). The Eighth Circuit also held that the mere possibility of adverse staff or inmate reaction was not an adequate ground in and of itself to return an inmate in close management. 776 F.2d at 234-35. Compare 801 F.2d at 1100-02 (App. 78-88). Although the Eighth Circuit held that district court was wrong in generally requiring that inmates be entitled to call witnesses in classification proceedings, the Eighth Circuit did impose that requirement "if, since the previous review hearing, an inmate has engaged in conduct that normally would result in disciplinary report, and if that conduct has not yet been addressed in a disciplinary hearing...." 776 F.2d at 235. Compare 801 F.2d at 1100-01 (App. 78-83).

This Court should issue the Writ of Certiorari to resolve any conflict between the Ninth and Eight Circuits' as to proper application of the Hewitt holding, and the flexibility, depending on context, available to district courts in fashioning remedies for unconstitutional lock-up procedures and conditions.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: March 31, 1987

86-1587 ②

Supreme Court, U.S.
FILED
MAR 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JOSEPH TOUSSAINT, et al.,
Petitioners,

VS.

DANIEL J. MCCARTHY,
Respondent.

SEPARATE APPENDIX PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[Argued and Submitted Dec. 13, 1985.
Decided Sept. 30, 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph TOUSSAINT, et al., Plaintiffs/Appellees/ Cross-Appellants,	No. 84-2833 No. 85-1507 No. 85-1878 No. 85-2526
v.	
Daniel McCARTHY, et al., Defendants/Appellants/ Cross-Appellees.	801 F.2d 1080 (9th Cir. 1986)

On Appeal From the United States District Court for the Northern District of California.

Before WRIGHT, KENNEDY and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Both parties appeal from the district court's order granting permanent injunctive relief against California prison officials. Although this appeal presents a variety of discrete issues, the case presents this general issue:

Does the protection afforded by the United States Constitution require that San Quentin and Folsom prison officials remain subject to controls imposed by the district court or should prison control be returned to California prison officials? We conclude that, in general, the district court assumed too much control over the day to day affairs of the prisons. Therefore, constitutional restraints require modification of the district court's degree.

I.
BACKGROUND

This class action was commenced on behalf of prisoners committed to administrative segregation in four California prison: San Quentin, Folsom, Deuel Vocational Institute at Tracy, and the Correctional Training Facility at Soledad. The defendants are the Director of the California Department of Corrections and the wardens of the prisons involved. We address orders pertaining to San Quentin and Folsom.

The complaint was filed in 1973. In the first phase of the proceedings, a three-judge district court held that he state's practice of removing prisoners from the general population and placing them in maximum security segregation units violated the prisoner's fourteenth amendment right to due process of law. See Wright v. Enomoto, 462 F.Supp. 397

(N.D. Cal. 1976) (hereinafter referred to as "Wright I"). In Wright I, the defendants were ordered to employ a variety of procedures before segregating prisoner for administrative reasons. See id. at 404-05. The Supreme Court summarily affirmed the district court. Enomoto v. Wright, 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978).

In the next phase of the litigation, the district court issued an unpublished comprehensive preliminary injunction governing the conditions of confinement in the segregation units of the four prisons. We reversed the district court and vacated the injunction on the grounds that the district court appealed the incorrect legal standard in assessing the plaintiffs' eighth amendment claims. See Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981).

On remand, the district reevaluated the conditions of confinement under the standard prescribed by Wright v. Rushen and issued a detailed preliminary injunction governing conditions of confinement and procedures for placement and retention in administrative segregation. See Toussaint v. Rushen, 553 F.Supp 1365 (N.D. Cal. 1983). Although we affirmed the district court for the most part, we vacated a portion of the order which was not supported by the record. Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984). We also directed the district court to reconsider its conclusions regarding the continuing propriety of procedural requirements in light of the Supreme Court's decision in Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). See

Toussaint v. Yockey, 722 F.2d at 1494 n. 6.

In the present phase of this case, the district court entered an injunction, which we refer to as the Permanent Injunction, governing conditions of confinement and segregation procedures at San Quentin and Folsom. Toussaint v. McCarthy, 597 F.Supp. 1388 (N.D. Cal. 1984). The court appointed a special master, known as the Monitor, to assist in the implementation of the Permanent Injunction and to advise the court regarding the need for further modifications to the Injunction. Id. at 1420-22. Pursuant to the order of reference, the Monitor ordered the release of a number of prisoners from administrative segregation.

Defendants now challenge various aspects of the Permanent Injunction and the district court's affirmance of the Monitor's order to release a number of prisoners from administrative segregation. Defendants urge us to vacate Parts III, IV(B), (C), and (D), and to modify Parts II(6), (10), and (15) of the Permanent Injunction. Defendants also complain about the district court's affirmance of the Monitor decision to release prisoners Altamirano, Mendoza, Ramos, Castro, Gallegos, Hayes, Ferrel, Shryock, Pina, Elmore and Barela.

Plaintiffs cross-appeal the district court's refusal to extend the sweep of the injunction to cover additional prison conditions. Plaintiffs urge us to hold that enforced idleness in administrative segregation constitutes cruel and unusual punishment, that inmates legitimately barred from the prison law library be provided with adequate legal assistance, that health care services provided at Folsom do not meet minimum constitutional standards, and that denial of contact visitation constitutes cruel and unusual punishment.

The opinions above offer additional discussion of the facts. We will discuss specific facts and arguments in turn.

II.
SCOPE OF FEDERAL INJUNCTIVE RELIEF

In Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), amended, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983), the Fifth Circuit reviewed a district court's order of injunctive relief against state prison officials. The Fifth Circuit described the role of the federal courts as follows:

> There is no iron curtain drawn between the Constitution and the prisons of this country. When the remedial powers of a federal court

> are invoked to protect the constitutional rights of inmates, the court may not take a hands-off approach.
>
> The duty to protect inmates' constitutional rights, however, does not confer the power to manage prisons, for which courts are ill-equipped, or the capacity to second-guess prison administrators. Federal courts should not, in the name of the Constitution, become enmeshed in the minutiae of prison operations. Our task is limited to enforcing constitutional standards and does not embrace superintending prison administration.

679 F.2d at 1126 (notes and quotations omitted). The court also stated that

> As a matter of respect for the state's role and for the allocation of functions in our federal system, as well as comity toward the state, the relief ordered by federal courts must be consistent with the policy of minimum intrusion into the affairs of state prison administration that the Supreme Court has articulated for the federal courts. "[T]he principles of federalism which play such an important part in governing the relationship between federal courts and state governments" are applicable "where injunctive relief is sought ... against those in charge of an executive branch of an agency of state" government. [Rizzo v. Goode, 423 U.S. 362, 380,

> 96 S.Ct. 598, 608, 46 L.Ed.2d 561 (1976).] We should, therefore, fashion the least intrusive remedy that will still be effective. In shaping that remedy, we must also, as a matter of judicial administration, regard the essential nature of federal courts in an adversary system. Our remedial powers are inherently judicial, not administrative.

679 F.2d at 1145 (notes and quotations omitted).

1. We agree with the Fifth Circuit's description of the role of the federal courts. Injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation. See Milliken v. Bradley, 433 U.S. 267, 280, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977) (remedy must be related to condition alleged to offend the constitution); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28

L.Ed.2d 554 (1971) (task is to correct, by a balancing of the interests, the condition that offends the constitution; judicial powers may be exercised only on the basis of a constitutional violation); Hoptowit v. Spellman, 753 F.2d 779, 785 (9th Cir. 1985) (judge must order correction of specific violations and may require only that these corrections bring the conditions above constitutional minima); Newman v. Alabama, 683 F.2d 1312, 1319 (5th Cir. 1982) (relief must be no broader than necessary to remedy the constitutional violation), cert. denied, 460 U.S. 1083, 103 S.Ct. 1773, 76 L.Ed.2d 346 (1983); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (function of court is limited to determining whether a constitutional violation has occurred and to fashioning a remedy that does no more and no less than correct that particular constitutional violation); Ruiz v. Estelle, 679 F.2d at 1144-46 (court must fashion the least intrusive remedy that will still be effective). A federal court may not enjoin a state official to follow state law. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 97-121, 104 S.Ct. 900, 906-19, 79 L.Ed.2d 67 (1984). "The federal courts do not sit to supervise state prisons, the administration of which is acute interest to the States." Meachum v. Fano, 427 U.S. 215, 229, 96 S.Ct. 2532, 2540, 49 L.ED.2d 451 (1976).

2. In fashioning a remedy for constitutional violations, a federal court must order effective relief. Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980). Therefore, a federal court may order relief that the

Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation. See North Carolina State Board of Education v. Swann, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 15-16, 91 S.Ct. at 1276. A defendant's history of noncompliance with prior court orders is a relevant factor in determining the necessary scope of an effective remedy. Hutto v. Finney, 437 U.S. 678, 687, 98 S.Ct. 2565, 2571, 57 L.Ed.2d 522 (1978); Hoptowit v. Ray, 682 F.2d at 1247; Ruiz v. Estelle, 679 F.2d at 1155-56.

However, our goal is to cure only constitutional violations. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16, 91 S.Ct. at 1276; Wright v. Rushen, 642 F.2d 1129, 1133-34

(9th Cir. 1981). The commission of a federal judge is not a "general assignment to go about doing good." Jett v. Castaneda, 578 F.2d 842, 845 (9th Cir. 1978). Accordingly, injunctive restraints that exceed constitutional minima must be narrowly tailored to prevent repetition of proved constitutional violations, and must not intrude unnecessarily on state functions. Ruiz v. Estelle, 679 F.2d at 1156. See generally Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L.Rev. 949 (1978).

III.

SCOPE OF APPELLATE REVIEW

[3,4] We are guided by three standards of review. We defer to the district court's findings of fact unless they are clearly erroneous. Anderson v. City of Bessemer, 470 U.S. 564, 105 S.Ct. 1504,

1510-11, 84 L.Ed.2d 518 (1985); Fed.R.Civ.P. 52(a). We review the district court's legal conclusions de novo. In re McLinn, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). We review the scope of injunctive relief for an abuse of discretion. Hutto v. Finney, 437 U.S. at 687-88, 98 S.Ct. at 2572; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 15, 91 S.Ct. at 1275-76; Hoptowit v. Ray, 682 F.2d at 1245-46.

The term "abuse of discretion," is often misunderstood and, perhaps, is an unfortunate label. See Pearson v. Dennison, 353 F.2d 24, 28 n. 6 (9th Cir. 1965); R. Aldisert, The Judicial Process, 759 (1976). Yet, the legacy of hundreds of cases renders "abuse of discretion" a term of art. See Friendly Indiscretion

About Discretion, 31 Emory L.J. 747, 762-63 (1982). We must recognize, however, that the term is a "verbal coat of many colors." Id. at 763 (quoting United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 39, 73 S.Ct. 67, 70, 97 L.Ed. 54 (1952) (Frankfurter, J., dissenting)). Judge Friendly notes that

> [t]here are half a dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremities.

Friendly, supra at 763.[1/] The Third Circuit has reasoned that

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[1/] We have recognized implicitly that the abuse of discretion standard varies with the decision being reviewed. See e.g. C-Y Development Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983); see also LeSportsac, Inc. v. K
(Footnote Continued)

> [i]n our judicial system, a wide variety of decisions covering a broad range of subject matters, both procedural and substantive, is left to the discretion of the trial court. The justifications for committing decisions to the discretion of the court are not uniform, and may vary with the specific type of decisions. Although the standard of review in such instances is generally framed as "abuse of discretion," in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

United States v. Criden, 648 F.2d 814, 817 (3rd Cir. 1981) (footnote omitted). We agree with Criden. The extent of our

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(Footnote Continued)

Mart Corp., 754 F.2d 71, 74-75 (2d Cir. 1985) (the term, "abuse of discretion," is capable of widely varying interpretations); Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 390 (7th Cir. 1984) ("abuse of discretion" describes a range of standards); Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984) ("abuse of discretion" is variable standard).

deference to the district court is determined by several competing factors.

The remedy prescribed by the district court is something more than a mere permanent injunction. We address a "structural injunction"[2] in which a United States district court has enjoined state administrative officials in order to force a state agency to comply with constitutional standards. Such an injunction presents several relevant considerations, some of which militate towards great deference, and others which demand close and exacting scrutiny.

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[2] The term, "structural injunction," refers to the course of litigation and the series of orders that seek to "effectuate the reorganization of an ongoing social institution." O. Fiss, The Civil Rights Injunction 7 (1978). This form of injunctive relief is known as an "institutional decree," and "administrative injunction," see Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 635 and n. 1 (1982), a "public law remedy," see Hinkle, Appellate Supervision of Remedies in Public Law Adjudication, 4 Fla.St.U. L.Rev. 411, 411-13 (1976); Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.L.Rev. 1281, 1313 (1976), and as "complex enforcement," see Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Har.L.Rev. 626, 626 n. 1 (1981).

In protracted, complex litigation, the district court will acquire a close familiarity with the facts, parties, and nuances of the case, especially, as is the situation here, when the same judge has presided throughout. See Hinkle, Appellate Supervision of Remedies in Public Law Adjudication, 4 Fla.St.U. L.Rev. 411, 440 (1976).[3/] The ability to

---

[3/] For instance, in the Arkansas prison litigation, Chief Judge Henley of the Eastern District of Arkansas continued to sit as a district judge by designation even after his appointment to the Eighth Circuit. See Finney v. Hutto, 410 F.Supp. 251 (E.D. Ark. 1976); O. Fiss &
(Footnote Continued)

hear witnesses and directly view prison conditions places the district court judge in a superior position to consider alternative forms of relief. A district court's ability to fashion the most effective remedy may be hampered by unnecessary appellate interference.

However, the choice of remedy in structural litigation also involves several factors weighing in favor of close appellate review. First, the very familiarity that allows a district court to design an effective remedy may lead to excessive involvement and a breakdown of institutional perspective. See Fiss, The Social and Political Foundations of

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(Footnote Continued)

D. Rendleman, Injunction 528-752 (2d ed. 1984) (case study of Arkansas prison litigation). See generally M. Harris & K. Spiller, After Decision: Implementation of Judicial Degrees in Correctional Settings (1977).

Adjudication, 6 Law & Human Behav. 121, 126 (1982). The court of appeals, which enjoys greater distance from the daily affairs of the litigation, is in a better position to assure detached neutrality. See Hinkle, supra, at 441.

Second, structural litigation frequently involves a close association of rights and remedies. See Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv.L.Rev. 626, 637-40 (1981). As we have noted above, the scope of federal injunctive relief against an agency of state government must be narrowly tailored to enforce constitutional requirements only. The adoption of a remedy in a particular case tends to establish the norm that defines the future standard of conduct.[4/] The precedential value of the adoption of a particular remedy raises questions of consistency and authoritativeness that can be resolved similarly to resolution of legal questions.

Third, and perhaps most importantly, a federal district court's exercise of discretion to enjoin state political bodies rasies serious questions regarding the legitimacy of its authority. See Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 642-44 (1982). Other than appellate review, few

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[4/] We do not mean to imply that the adoption of a particular remedy in a given case requires the use of that remedy in another case. Indeed, we share Judge Sneed's view that courts should hesitate before "constitutionalizing" a remedy.

effective external controls check the district court's power.

5. Our weighing of the above factors leads us to the following standard of review. We will scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' constitutional rights and does not require more of state officials than is necessary to assure their compliance with the constitution. Within these parameters, we will defer to the district court.

IV.

THE EXISTENCE OF A LIBERTY INTEREST

6. The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law ..." U.S. Const. amend. XIV, § 1; _see_ _Hewitt v. Helms_, 459 U.S. at 466, 103 S.Ct. at 868.

Our threshold inquiry, therefore, is whether plaintiffs have a liberty interest in remaining in the general population. If plaintiffs do not possess a liberty interest, the constitution does not require prison officials to accord plaintiffs any procedural protections when deciding to segregate plaintiffs for administrative reasons. See Meachum v. Fano, 427 U.S. 214, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

7. A liberty interest may arise from either of two sources: the due process clause itself or state law. Hewitt, 459 U.S. at 466, 103 S.Ct. at 868. In Wright I, the distict court held that California prisoners possessed liberty interests on both grounds. First, the court held that the due process clause itself prohibits arbitrary

placement of prisoners in administrative segregation. The court reasoned that:

> When a prisoner is transferred from the general prison population to the grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons, there is a severe impairment of the residuum of liberty which he retains as a prisoner -- an impairment which triggers the requirement for due process safeguards.

462 F.Supp. at 402. Second, the court held that section 3330 of Chapter 4, Article 6 of the Rules and Regulations of the Director of Corrections constituted a state-created liberty interest.[5] The

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[5] At the time of the district court's decision in Wright I, 15 Cal.Admin.Code § 3330 provided:

> General Policy. (a) Inmates must be segregated from other when it is reasonably believed that they are a menace to themselves and other or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative

(Footnote Continued)

district court assumed that the Wright I decision was law of the case in these proceedings. 597 F.Supp. at 1416. Plaintiffs, similarly, contend that we are bound by Wright I, especially in light of the Supreme Court's summary affirmance.

A. LAW OF THE CASE

The doctrine of law of the case was "crafted with the course of ordinary litigation in mind. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which after appeal, the binding finality of res judicata and

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(Footnote Continued)

> reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.

462 F.Supp. at 403.

collateral estoppel will attach." Arizona v. California, 460 U.S. 605, 618-19, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). Here, however, we review a structural injunction, which involves the ongoing application of changing law to changing circumstances.

8. Because permanent injunctive relief controls future conduct, we are sensitive to the need for modification when circumstances change.

> A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative ... [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

United States v. Swift & Co., 286 U.S. 106, 114-15, 52 S.Ct. 460, 462, 76 L.Ed 999 (1932 (citations omitted). A change in the law may constitute a changing circumstance requiring the modification of an injunction. System Federation No. 91 v. Wright, 364 U.S. 642, 647-48, 81 S.Ct. 368, 371, 5 L.Ed.2d 349 (1961). An intervening judicial opinion may require modification of an injunction. See Pasadena City Board of Education v. Spangler, 427 U.S. 424, 437-38, 96 S.Ct. 2697, 2705, 49 L.Ed.2d 599 (1976) (when intervening clarification of constitutional law reduced obligations of state officials, district court abused it discretion by refusing to modify injunction accordingly). "When a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law." American Horse Protection Association v. Watt, 694 F.2d 1310, 1316 (D.C.Cir. 1982)[6/]

The Fourth Circuit's decision in Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981), is closely analogous to the instant case. In Nelson, the district court found "double celling" of inmates to be cruel and unusual punishment and ordered the prison administration to cease double celling. Id. at 421. The Fourth Circuit affirmed the district court's legal conclusions but remanded with instructions to fashion a decree

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6/ See also Wright & Miller, Federal Practice & Procedure, § 2961, pp. 604-605 (1973) ("The three traditional reasons for ordering the modification or vacation of an injunction are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law").

that incorporated defendant's timetable for elimination of overcrowding. Id. see Johnson v. Levine, 588 F.2d 1378 (th Cir. 1978) (en banc). The district court modified its decree accordingly. See 659 F.2d at 421 (procedural background of case). When defendants realized that they could not comply with prescribed timetables, they moved to modify the injunction. See id. at 423. In April of 1981, the district court denied the motion, found defendants in civil contempt, and imposed sanctions. See id. Defendants appealed. Id. On June 15, 1981, the Supreme Court decided Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), which held, in short, that double celling does not violate the eighth amendment. The Fourth Circuit vacated the district court's order disapproving double celling. See

659 F.2d at 429. The Fourth Circuit also vacated the civil contempt citation and imposition of sanctions. Id. The Fourth Circuit reasoned that "[t]he question for purposes of decision here becomes, therefore, whether there have been, since the entry of the original Decree in these cases, changes in either operative facts or laws which cast a new light upon the facts or law as originally ruled on in these cases." Id. at 424. The Nelson court found that Rhodes v. Chapman, and Bell v. Wolfish, 441, U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), mandated a different result from that reached by the court sitting en banc. 659 f.2d at 424-29.[7]

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[7] The standards for modification of an injunction should apply with equal,, if not greater vigor, to direct appeals of
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The Eleventh Circuit's opinion in Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984), similarly demonstrates that

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an order of permanent injunctive relief. A modification under Fed.R.Civ.P. 60(b)(5) implicates the judicial ideals of repose and finality; a settled decision may be overturned. A direct appeal of an order of a permanent injunction, however, does not implicate repose or finality. Therfore, the procedural distinctions between a motion to modify an injunction and a direct appeal do not justify a more deferential approach in the case of direct appeals.

The Eighth Circuit's decision in Finney v. Arkansas Board of Correction, 505, F.2d 194 (8th Cir. 1974), supports this conclusion. In Finney, the district court granted injunctive relief regarding disciplinary procedures employed in the Arkansas prison system. Id. at 208. After the district court ordered relief, the Supreme Court decided Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The Eighth Circuit found that Wolff required a greater measure of relief and ordered the district court to modify its decree accordingly. 505 F.2d at 208. In Finney, the court of appeals applied intervening law in a direct appeal of a district court's order of injunctive relief. We find ourselves in a similar procedural position.

structural injunctive relief must follow the changing contours of constitutional law. In Newman, the district court ordered prison administrators to show cause why they should not be held in contempt for violating prior orders of the court concerning the Alabama state prison system. Id. at 1519. The district court also ordered that prisoners be released from confinement to relieve overcrowding. Id. The Eleventh Circuit vacated the order. Id. at 1522. The court held that "total compliance with a prior judgment or consent decree is not required before a court can entertain a request for modification." Id. at 1519-20. The Eleventh Circuit further held that the Supreme Court's intervening decision in Rhodes v. Chapman, along with changed factual circumstances, required reconsideration of the propriety of injunctive relief. _Id_. at 1521.[8]

9. Similarly, we cannot rely on _Wright I_. Neither premise upon which the _Wright I_ court relied in finding a liberty interest still exists.

In _Hewitt v. Helms_, the Supreme Court held that the due process clause does not of its own force create a liberty interest in freedom from administrative segregation.

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[8] In _Graddick_, the Eleventh Circuit considered the prospect that a motion to modify an injunction would be used as a dilatory tactic. The Eleventh Circuit reasoned that:

> The contention could be made that this decision would simply mean that the defendants could continually delay enforcement of a remedy for unconstitutionality by seeking modification every time enforcement is sought. This should not be a necessary result. The good faith of the defendants and the substantiality of the alleged improvements would always be a consideration before a hearing on modification would be required.

740 F.2d at 1521. We agree.

> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence .... Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.

Hewitt, 459 U.S. at 468, 103 S.Ct. at 869. A liberty interest does not arise even when administrative segregation imposes "severe hardships," such as "denial of access to vocational, educational, recreational, and rehabilitative programs, restrictions on exercise, and confinement to [one's] cell for lengthy periods of time." See id. at 467 n. 4, 103 S.Ct. at 869 n. 4; Clark v. Brewer, 776 F.2d 226, 228-30 (8th Cir. 1985) (due process clause itself does not create liberty interest notwithstanding the fact that conditions in "close management" are significantly more harsh than conditions in general population); see also McFarland v. Cassady, 779 F.2d 1426, 1427-28 (9th Cir. 1986) (Supreme Court in Hewitt held that due process clause does not give inmate liberty interest in remaining in general population). Therefore, the Wright I court's holding that the due process clause creates a liberty interest in remaining in the general population is no longer correct.

10. The Wright I court's reliance on section 3330 is entitled to no deference. The version of section 3330 upon which the Wright I court relied has been repealed. See 15 Cal.Admin.Code § 3330 (former section 3330 was repealed

on April 18, 1980).[9/] A state-created liberty interest exists only as long as the statute or regulation creating it remains effective. If the state repeals the statute or eliminates the regulation, the liberty interest ceases to exist. Clark v. Brewer, 775 F.2d at 232. The Wright I liberty interest determinations, therefore, neither guide nor control our consideration today.[10/]

[9/] Because section 3330 has been repealed, we need not consider whether the language of that section would create a liberty interest under current standards.

[10/] The plaintiffs argue that the Supreme Court in Hewitt reaffirmed its summary affirmance of Wight I. We disagree. In Hewitt, the Court merely noted that its summary affirmance of Wight I was the only case in which the Court had found that state statutes or regulations created a liberty interest in freedom from segregated housing within a prison. 459 U.S. at 469, 103 S.Ct. at 870. The Court neither reaffirmed nor
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Therefore, the doctrine of law of the case does not preclude review of the continuing propriety of permanent injunctive relief.[11] The relevant

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rejected its holding in Wright I; the reference to Wright I was entirely neutral.

Plaintiffs point out that the Court in Hewitt had the opportunity to reject its earlier affirmance of Wright I yet failed to do so. Plaintiffs argue that the Court's silence indicates approval of Wright I. This argument seriously misapprehends the nature of judicial opinions. It is a well recognized maxim that a court ought to avoid unnecessary decisions. Such decisions are dicta. The Court in Hewitt had no need to revisit Wright I. We refuse to attribute a hidden meaning to the Court's failure to engage in obiter dictum.

[11] Even if the doctrine of law of the case applied in its usual manner, its strictures would not require blind obeisance to outdated legal principles. As the Supreme Court noted in Arizona v. California, supra:

> Unlike the more precise requirement of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when court decides upon

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question becomes whether intervening

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> a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Law of the case directs a court's discretion, it does not limit the tribunal's power.

460 U.S. at 618, 103 S.Ct. at 1319 (citations omitted). We have recognized that the doctrine is not to be applied woodenly. *Russell v. Commissioner*, 678 F.2d 782, 785 (9th Cir. 1982), and that we will reconsider issues that have previously been decided "if such a course is warranted by 'considerations of substantial justice.'" *United States v. Imperial Irrigation District*, 559 F.2d 509, 520 (9th Cir. 1977) (quoting *Lehrman v. Gulf Oil Corp*., 500 F.2d 659, 662-63 (5th Cir. 1974), *cert*. *denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975)). We have also recognized that a prior decision should not be followed if "controlling authority has since made a contrary decision of the law applicable to such issues." *Kimball v. Callahan*, 590 F.2d 768, 771-72 (9th Cir.), *cert*. *denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979); *see Handi Investment Co. v. Mobil Oil Corp*., 653 F.2d 391, 392-93 (9th Cir. 1981) (examining intervening case law to determine whether contrary result was proper); *see also Amen v. City of Dearborn*, 718 F.2d 789, 794 (6th Cir. 1983) (doctrine of law of the case "must

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changes in law or fact require different results.

B. EIGHTH AMENDMENT LIBERTY INTEREST

11. Plaintiffs argue that the existence of eighth amendment violations in the administrative segregation units

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yield to an intervening change of controlling law between the date of the first ruling and the retrial"); In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981) (decision may be reexamined in light of changes in governing law); EEOC v. International Longshoreman's Ass'n, 623 F.2d 1054, 1058 (5th Cir. 1980) (law of the case does not apply when controlling authority has since made a contrary decision of law inapplicable), cert. denied, 451 U.S. 917, 101 S.Ct. 1997, 68 L.Ed.2d 310 (1981); White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967) (intervening controling decision constitutes exception to doctrine of the law of the case), cited with approval in Arizona v. California, 460 U.S. at 618 n. 8, 103 S.Ct. at 1391 n. 8.

raises a due process liberty interest. We disagree.

Plaintiffs' sole authority for this proposition is a footnote from Justice Stevens' dissenting opinion in Hewitt v. Helm. We find this a curious use of authority. Not only is the sole authority a footnote from a dissenting opinion, but the footnote does not support plaintiffs' position. Justice Stevens indicated that if such eighth amendment violations existed, "the Constitution would impose substantive, rather than procedural limits on transfers into segregated status." 459 U.S. at 481 n. 4, 103 S.Ct. at 876 n. 4 (emphasis added).

12. Some fundamental considerations support Justice Stevens' conclusion. The state has no right to subject a prisoner to cruel and unusual punishment. The

eighth amendment is not a "maybe" or a "sometimes" proposition. If conditions violate the eighth amendment, all prisoners have the right to be free of such conditions. The right does not vary depending on the threat that the individual prisoner represents to institutional security. No amount of process can justify subjecting a prisoner to cruel and unusual punishment.

Moreover, acceptance of such an argument would create an unworkable standard. The assumption implicit in plaintiffs' argument is that eighth amendment violations exist in the segregation unit but do not exist in the general population. If both locations were infected with eighth amendment violations, process would be a meaningless gesture; it would make no sense to interpose a constitutional impediment to transfer from one place to another when the conditions in both locations are constitutionally impermissible.[12]

Assuming arguendo that the conditions in the general population lacked significant eighth amendment violations, we would have to determine what quantum of violation in administrative segregation would be sufficient to create an eighth amendment liberty interest. Wright v. Rushen, 642 F.2d at 1133-35, counsels that we consider separately each condition that allegedly contributes to the violation of plaintiffs' eighth amendment rights; a variety of discrete conditions exist in the segregation units. If we were to find that the defendants cured one of the conditions, would the eighth amendment liberty interest evaporate? Or if we were to find that a particular condition in the general population violated the eighth amendment, would the liberty interest vanish? Or perhaps plaintiffs would have us hold that a prisoner has an interest in remaining with his own eighth amendment violation and not being subjected to another in its place. Plaintiffs' approach would require a comprehensive determination regarding the conditions throughout the prison, if not the entire state prison system, to determine whether the eighth amendment created a due process liberty interest. We decline to require such an ambitious task in the name of such a dubious proposition.

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[12] The conditions at San Quentin perfectly illustrate the infirmities of plaintiffs' arguement. While we focus on the conditions in administrative segregation, state-court litigation is currently addressing the problems in San Quentin's general population. See Wilson v. Deukmejian, No. 103454 (Sup.Ct. Marin County, August 5, 1983) (Tentative Decision and Proposed Statement of Decision; Savitt, J.). Although we hesitate to venture into areas beyond the scope of this case, we cannot ignore reality. Judge Savitt's proposed decision paints as bleak a picture of the conditions in San Quentin's general population as does Judge Weigel's description of the segregation units.

The presence of eighth amendment violations in the segregation units, therefore, does not create a liberty interest. We will not parlay one constitutional right into another.

C. STATE-CREATED LIBERTY INTEREST

13. Several cases decided after the Supreme Court affirmed the district court's decision in Wright I illuminate our perspective on state-created liberty interests. Before we will recognize a constitutionally protected liberty

interest, state law must direct that a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates. See Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983); Hewitt v. Helms, 459 U.S. 460, 470-72, 103 S.Ct. 864, 870-71, 74 L.Ed.2d 675 (1983); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 422 U.S. 1, 11-12, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979); Meachum v. Fano, 427 U.S. 215, 226-27, 96 S.Ct. 2532, 2539, 49 L.Ed.2d 451 (1976); Allen v. Board of Pardons, 792 F.2d 1404 (1986); Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986); MacFarland v. Cassady, 779 F.2d 1426, 1428 (9th Cir. 1985); Baumann v. Arizona Department of Corrections, 754 F.2d 841, 844 (9th Cir. 1985).

14. The adoption of guidelines to structure the exercise of discretion does not necessarily create a liberty interest. Roberts v. Spalding, 783 F.2d at 870; Baumann v. Arizona Department of Corrections, 754 F.2d at 844. As the Supreme Court has stated,

> The creation of procedural guidelines to channel the decision-making of prison officials is, in the view of many experts in the field, a salutory development. It would be ironic to hold that when a state embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal court, while states that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause. The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the state chose to require.

Hewitt v. Helms, 459 U.S. at 471, 103 S.Ct. at 871.

1. The California Statutory Sentence Credit Scheme

The district court held that California Penal Code sections 2931 through 2933[13] create a liberty interest in sentence reducing credits. 597 F.Supp at 1416-17.

In a nutshell, sections 2931 and 2933 create a two-tiered scheme:

> Penal Code section 2933 provides that a state prison inmate may receive six months of worktime credit for every six months of full-time performance in a credit qualifying work, training or education program established by the Director of Corrections. Prisoners willing to participate in a full-time credit qualifying assignment, but who either are not assigned to such a program, or are to earn credits under the formula provided for by Penal Code section 2931, which is a four-month combined work and good behavior credit for each eight months served.

People v. Vallardes, 162 Cal.App.3d 312, 320, 208 Cal.Rptr. 604, 608 (1984).

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[13] See Appendix.

15. Examination of section 2933 leads to the conclusion that prisoners have no right to earn the one-for-one worktime credits provided by that section. Section 2933 provides that "[w]orktime credit is a privilege, not a right." Cal.Penal Code § 2933(b). Section 2933 expressly contemplates that not all prisoners will be assigned to a credit qualifying program. See Cal.Penal Code § 2933(a) ("... every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to full-time assignment or is assigned to a program for less that full time, shall receive no less credit than is provided under section 2931"). Although the California legislature intended the worktime sentence reducing scheme to instill a work ethic, see People v. Vallardes,

162 Cal.App.3d at 321, 208 Cal.Rptr. at 609, it did not create an absolute right to participate in work programs; the legislature created only a "reasonable opportunity." See Cal.Penal Code § 2933(b).

Moreover, a prisoner's "reasonable opportunity to participate" must be "consistent with institutional security and available resources." See Cal.Penal Code § 2933(b). Section 2933 delegates broad authority to the Director of Corrections to allocate worktime resources between various categories of prisoners. See, e.g., In re Barnes, 176 Cal.App.3d 235, 221 Cal.Rptr. 415, 416-17 (1985) (Department of Corrections has established priority list; segregation unit prisoners are at bottom of list). Prisoners are not entitled automatically to participate in worktime credit programs. People v. Rosaia, 157 Cal.App.3d 832, 848, 203 Cal.Rptr. 856, 867 (1984). There is no guarantee that work programs will be available. People v. Caruso, 161 Cal.App.3d 13, 16 n. 5, 207 Cal.Rptr. 221, 224 n. 5 (1984). In sum, section 2933 merely creates a possibility of early release; it does not create a constitutionally protected liberty interest. See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1,8-11, 99 S.Ct. 2100, 2104-05, 60 L.Ed.2d 668 (1979). Therefore, we conclude that section 2933 does not create a liberty interest in one-for-one worktime credits.

This conclusion, however, does not address the question of whether section 2933 creates a liberty interest in the one-for-two goodtime credits provided by section 1931. Section 2931 applies by its own terms to prisoners who are incarcerated for crimes committed prior to January 1, 1983 and who have not waived the right to receive credits under section 2931. Cal.Penal Code §§ 2931(d), 2934; _see_ _In_ _re_ _Ramirez_, 39 Cal.3d 931, 933, 705 P.2d 897, 899, 218 Cal.Rptr. 324, 325-26 (1985), _cert_. _denied_, _____ U.S. ______, 106 S.Ct. 2266, 90 L.Ed.2d 711 (1986). More importantly for our purposes, section 2933 establishes that prisoners who are willing to participate in the worktime credit scheme but who are denied the opportunity to do so through no fault of their own "shall receive no less credit that is provided under Section 2931." Cal.Penal Code § 2933(a).

Section 2931 provides that a prisoner's sentence may be reduced by four months for every eight months that the prisoner serves. Three of the four months accrue automatically if the prisoner commits no illegal acts or serious disciplinary infractions. Cal.Penal Code § 2931(b). One of the four months is based solely on participation in "work, educational, vocational, therapeutic or other prison activities." Cal.Penal Code § 2931(c). In practice, this one month credit is granted unless a prisoner refuses to accept work when offered. People v. Austin, 30 Cal.3d 155, 161-62, 636 P.2d 1, 5, 178 Cal.Rptr. 312, 316 (1981); 15 Cal.Admin.Code § 3043; Cal.Penal Code §§ 2931(c), 2932 (b); see also People v. Sage, 26 Cal.3d 498, 510 n. 1, 611 P.2d 874, 880-81 n. 1, 165 Cal.Rptr. 280, 286 n. 1 (1980) (Bird, C.J., concurring and dissenting).

16. While section 2931 differs somewhat from the Nebraska statute at

issue in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), in all material respects it is identical. Section 2931 contains the "shall/unless" formula that we find dispositive. See Baumann v. Arizona Department of Corrections, 754 F.2d 841, 844 (9th Cir. 1985). Therefore, we conclude that section 2931 creates a constitutionally protected liberty interest.

[17, 18] The conclusion that section 2931 creates a liberty interest, however, does not assist plaintiffs in this case. Since the defendants generally grant the credit to segregated prisoners, administrative segregation does not implicate the liberty interest arising from sections 2931 and 2933. The existence of a liberty interest,

therefore, is irrelevant and cannot support the district court's holdings.[14]

1. California Decisional Law

The plaintiffs argue that "by virtue of its appellate court decisions applying its constitution, California has created a "substantial liberty interest in not being placed in lockup by arbitrary procedures." Plaintiffs primarily rely on Conti v. Dyer, 593 F.Supp. 696 (N.D.Cal. 1984).

In Conti, the district court held that California state-court decisions created a liberty interest cognizable under the federal Constitution. Id. at 700-02. The Conti court found that California decisional law created a federal liberty interest notwithstanding the fact that the California courts expressly reject federal due process analysis and recognize a liberty interest in freedom from all arbitrary state action, Id. at 701; see People v. Ramirez, 25 Cal.Rptr. 316, 320 (1979) ("When an individual is subjected to the deprivatory governmental action he always has a due process liberty interest both in fair and unprejudiced decision making and in being treated with respect and dignity."); see also Inmates of Sybil Brand Institute for Women v. County of Los Angeles, 130 Cal.App.3d 89, 108, 181 Cal.Rptr. 599, 609 (1982).

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[14] The distict court found that credits due under sections 2931 and 2933 are not invariably afforded. To the extent that the defendants may from time to time deny the credits due under sections 1931 and 2933, without affording a prisoner due process of law, that prisoner may obtain *habeas corpus* relief. *See* *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S.Ct. 1827, 1841, 36 L.Ed.2d 439 (1973).

The district court's decision in Conti is not persuasive for several reasons. First, the court failed to acknowledge that the due process clause of the fourteenth amendment and the due process clause of the California constitution seek to protect qualitatively different inmates. Under the fourteenth amendment, when the state deprives a person of liberty, it must provide that person with procedural protection. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Unless a liberty interest is implicated, arbitrary state action does not violate the fourteenth amendment. Hewitt, 459 U.S. at 466-69, 103 S.Ct. at 868-70. The due process clause of the fourteenth amendment focuses in relevant part on protecting liberty. The due process clause of the

California constitution also seeks to protect liberty. But in addition, the due process clause of the California constitution seeks to promote accuracy and reasonable predictability in all government decision making when individuals are subject to any deprivatory action. People v. Ramirez, 158 Cal.Rptr. at 320. The California constitution does not impose the threshold requirement that a liberty interest exist. Id.

Even though the distinction between the two approaches will be academic in some instances, the distinction is critical in prisoners' rights cases. Under federal due process analysis, a legally incarcerated prisoner is stripped of all but the most incremental interest in liberty. Hewitt, 459 U.S. at 467, 103 S.Ct. at 869; Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). The federal perspective instructs that arbitrary decision making cannot deprive a person of that which has already been taken. Greenholtz, 442 U.S.at 8-11, 99 S.Ct. at 2104-05. The threshold inquiry, therefore, is whether the state has given back to the prisoner some liberty interest that previously the state had taken away. Stated alternatively, we must determine to what extent the state has deprived a criminal defendant of liberty in the first place.

[19, 20] For federal purposes, the extent and nature of the prisoners' remaining or re-created liberty is determined by looking for the substantive conditions or predicates that must exist before the state can again take the

liberty away. Baumann v. Arizona Department of Corrections, 754 F.2d. 841, 843-45 (9th Cir. 1985).[15] The quantity of procedural protections that a state may offer prisoners is not dispositive in determining the existence of a federal liberty interest. Greenholtz, 442 U.S. at 7, 99 S.Ct. at 2103. As the Court in Olim v. Wakinekona, stated,

> "[a] liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality." [Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982).] Process is not an end in itself. Its

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[15] The difference between substantive and procedural predicates to denial of liberty can be illustrated as follows. A person cannot be imprisoned unless he is tried. The trial is the procedural predicate to imprisonment. But merely affording a person a trial does not entitle the state to imprison a person; the state must prove the person's guilt. Guilt is the substantive predicate to imprisonment. The procedural predicate merely assists in determining the existence of the substantive predicate.

> constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.

461 U.S. at 250, 103 S.Ct. at 1748 (footnote omitted).

In contrast, the California due process clause requires process notwithstanding the absence of substantive predicates or conditions. People . Ramirez, 158 Cal.Rptr. at 320. The state's provision of additional protection is entirely permissible. But the fact that the state courts call this additional protection a liberty interest does not make it so for the purposes of the federal constitution. Although a state court's determination of state law binds the federal courts, interpretation of the federal constitution cannot be circumscribed by state definitions. The California cases requiring heightened procedural protection, therefore, do not create a federally cognizable liberty interest.

2. California Prison Regulation

The Plaintiffs argue that sections 3335 and 3336 of Title 15 of the California Administrative Code create a liberty interest. These sections govern the placement and retentions of prisoners in administrative segregation.

Our hesitance to construe a statute or regulation as creating a liberty interest is especially great when the statute or regulation governs the day-to-day administration of a prison. Again, Hewitt instructs that

> The deprivation imposed in the course of daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and goodtime credits. Moreover, the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted tot he expertise of prison officials ....

> These facts suggest that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to "liberty," different from statutes and regulations in other areas.

Hewitt v. Helms, 459 at 470, 103 S.Ct. at 870 (citations omitted). Accordingly, we have noted in the context of inter-institutional transfers that "[u]nless there is some guarantee that transfer will not be effected except for misbehavior or some other specified reason, due process protections cannot apply." Rizzo v. Dawson, 778 f.2d at 530 (emphasis added).

21. We are convinced that sections 3335 and 3336, standing alone, do not create a liberty interest. However, when read in conjunction with section 3339 of the California Administrative Code, sections 3335 and 3336 withstand our exacting scrutiny; they create a

constitutionally protected liberty interest.

Section 3335[16/] specifies those circumstances requiring the immediate removal of an inmate from the general population. Nothing in section 3335 purports to limit the Department of Correction's authority to segregate inmates to the circumstances enumerated in that section. The only mandatory language in section 3335 runs to the benefit of prisoners in the general population; they have some expectation that their dangerous neighbors will be removed _to_ administrative segregation. Nothing in section 3335 suggests that a prisoner shall be allowed to _remain_ in

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[16/] See Appendix.

the general population absent the specified circumstances.

Section 3336[17] contains mandatory language running to the benefit of the segregated prisoner. Specifically, section 3336 requires that a sufficiently senior officer make the segregation decision, that the decision be documented, that the prisoner receive assistance, if needed, in presenting his case, and that the prisoner be informed of the reason for his segregation. Sections 3335 and 3336 standing alone, therefore, constitute a procedural guideline that "channel[s] the decision-making of prison officials." See Hewitt, 459 U.S. at 471, 103 S.Ct. at 871. Such procedural requirements, even if mandatory, do not raise a constitutionally cognizable liberty interest. Olim v. Wakinekona, 461 U.S. at 250, 103 S.Ct. at 1748.

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[17] See Appendix.

However, section 3339(a) provides that "[r]elease from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate's initial placement in administrative segregation." 15 Cal.Admin.Code § 3339(a) (emphasis added). Section 3339(a) indicates that absent justification, a prisoner may not be retained in administrative segregation. The use of the word, shall, constitutes the mandatory language needed to create a liberty interest. See Hewitt, 459 U.S. at 471-72, 103 S.Ct. at 871.

As the Supreme Court reasoned in Hewitt, the word "shall" alone is not sufficient. Rather, the liberty interest is created when the word "shall" is used to mandate certain procedures "in connection with requiring specific substantive predicates for action." 459 U.S. at 472, 103 S.Ct. at 871 (emphasis added). Those substantive predicates are contained in section 3335, and include standards for removal from the general inmate population where there is an immediate threat to the inmate's own safety or the safety of others, or when institutional security is endangered or the integrity of an investigation put in jeopardy. These standards are incorporated into section 3339 by that section's reference to "the circumstances and reasons for the inmate's initial placement in administrative segregation." We think, therefore, that the word "shall," read in conjunction with these specific substantive predicates, does create a liberty interest in the present case. We note, moreover, that the word "shall" is not used simply to mandate an investigation but to mandate immediate release, absent procedures that determine that the substantive predicates for retaining the inmate in restrictive custody are demonstrated.

V.
PROCEDURAL REQUIREMENTS GOVERNING PLACEMENT AND RETENTION IN ADMINISTRATIVE SEGREGATION

A. PLACEMENT

Our conclusion that the state has created a liberty interest in freedom from administrative segregation requires us to determine the quantum of process required by the fourteenth amendment. The determination of what process is due

> generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action;

> second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12, 99 S.Ct. 2100, 2106, 60 L.Ed.2d 668 (1979) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

The district court incorporated the procedural requirements mandated by the three-judge court in *Wright I*. *See*

597 F.Supp. at 1424. The Wright I order followed the procedures required for disciplinary confinement and denial of good time credits established in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). See Wright I, 462 F.Supp. at 403-05.[18] The district court also established additional procedural requirements. The court ordered the defendants to release a

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[18] The Wolff procedures apply when a state, for disciplinary reasons, seeks to withdraw sentence credits that a prisoner already has acquired. See Wolff, 418 U.S. at 555-58, 94 S.Ct. at 2974-75. In Wolff, the Supreme Court held that a prisoner facing misconduct charges be accorded 24 hours' advance written notice of the charges against him; the right to call witnesses and present documentary evidence in a manner consistent with institutional security; if illiterate, staff assistance in preparing a defense; an impartial tribunal; and a written statement explaining the basis of the tribunal's decision. See Wolff v. McDonnell, 418 U.S. at 563-72, 94 S.Ct. at 2978-82.

prisoner no later than twelve months after placement in administrative segregation unless that prisoner is afforded all the hearing rights that attend the initial segregation decision. 597 F.Supp. at 1424. The court also required disclosure of the identity of any person providing information to prison authorities unless disclosure would endanger the safety of the source. _Id_. at 1424-25. Finally, the court prohibited segregation on the basis of undisclosed information. _Id_. at 1425.

In _Hewitt v. Helms_, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), the Supreme Court held that a lesser quantum of process is due when a prisoner is placed in administrative segregation than is required by _Wolff_. The Court stated:

> We think an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the

> decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding to transfer him to administrative segregation. Ordinarily, a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decisionmaker reviews the charges and then available evidence against the prisoner, the Due Process Clause is satisfied.

459 U.S. at 476, 103 S.Ct. at 874. The process mandated for administrative segregation under Hewitt, therefore, is substantially less than that required by Part III of the Permanent Injunction.

Plaintiffs nonetheless argue that Hewitt is distinguishable and a higher quantum of process is due in the instant case. Plaintiffs argue that they have a greater private interest than did the prisoner in Hewitt, that the presence of eighth amendment violations requires heightened process, and that the defendant' noncompliance with prior court orders requires a highly structured administrative proceeding.

We disagree. We recognize that the segregation units at issue in Hewitt were modern facilities and that the segregation units at San Quentin and Folsom, in contrast, are riddled with conditions that violate the plaintiffs' eighth amendment rights. Nevertheless, the Court in Hewitt proceeded on the premise that placement in administrative segregation would result in "severe hardships." 459 U.S. at 467 n. 4, 103 S.Ct. at 869 n. 4. The hardships that a segregated prisoner in Hewitt would face included "denial of access to vocational, educational, recreational, and rehabilitative programs, restrictions on exercise, and confinement to [one's] cell for lengthy periods of time." Id.; see id. at 479-80 n. 1, 103 S.Ct. at 875-76 n. 1 (Stevens, J., dissenting). the distinction between the private interest at issue in Hewitt and that at issue here is not as extreme as the plaintiffs assert.

In addition, the state's interest in maintaining security in San Quentin and Folsom is at least as great, if not greater, than the state's interest shown in Hewitt. The inmate population at San Quentin and Folsom is composed of the most violent and anti-social offenders in the California prison system. See 597 F.Supp. at 1394, 1404-05. Given the disruptive propensities of the inmate population, we are especially sensitive to the Supreme Court's admonition that "[t]he safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." Hewitt, 459 U.S. at 473, 103 S.Ct. at 872.[19/] The state's interest in maintaining safety and security weighs heavily in favor of avoiding prolonged and cumbersome administrative proceedings.

Finally, the value of Wolff-type procedures was minimal in the context of the decision to segregate a prisoner for

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[19/] Once again, we note that failure to remove dangerous prisoners from the general population may amount to a breach of the state' constitutional duties. See Wright v. Rushen, 642 F.2d. at 1134 n. 3 (citing Williams v. Edwards, 547 F.2d. 1206, 1211 (5th Cir. 1977); see also Thomas v. Booker, 784 f.2d 299, 303 (8th Cir.) (en banc), cert. denied, ____ U.S. ____, 106 S.Ct. 1975, 90 L.Ed.2d 659 (1986).

administrative reasons. When determining whether the prisoner was guilty of misconduct, as was the case in Wolff, the inquiry is essentially factual. The prison administrator seeks to determine whether the prisoner committed the alleged offense. When deciding whether administrative segregation is needed, however, the administrator relies largely on subjective factors:

> In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners inter se, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole

> decisions, turns largely on purely subjective evaluations and on predictions of future behavior; indeed, the administrators must predict not just one inmates future actions, as in parole, but those of an entire institution.

Hewitt v. Helms, 45f9 U.S. at 474, 103 S.Ct. at 872-73 (citations omitted); see also Jones v. North Carolina Prisoner' Labor Union, Inc., 433 U.S. 119, 132-33, 97 S.Ct. 2532, 2541, 53 L.Ed.2d 629 (1977); 15 Cal.Admin. Code § 3338(d), (e). A trial-like proceeding is unlikely to inform a prison administrator regarding such subjective considerations. See Clark v. Brewer, 776 F.2d at 235.

[22] We conclude that when prison officials initially determine whether a prisoner is to be segregated for administrative reasons due process only requires the following procedures: Prison officials must hold an informal

nonadversary hearing within a reasonable time after the prisoner is segregated.[20] The prison officials must inform the prison of the charges against the prisoner or their reasons for considering segregation. Prison officials must allow the prisoner to present his views.

[23] We specifically find that the due process clause does not require detailed written notice of charges, representation by counsel or counsel-substitute, an opportunity to present witnesses, or a written decision describing the reasons for placing the prisoner in administrative segregation.

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[20] The district court's requirement that a hearing be held within 72 hours of segregation constitutes a "reasonable time." See Hewitt v. Helms, 459 U.S. at 476-78 nn. 8 & 9, 103 S.Ct. at 874 nn. 8 & 9. We intimate no view as to whether due process would tolerate a more lengthy delay.

_Cf_. _Wright I_, 462 F.Supp at 404-05; _Toussaint III_, 597 F.Supp. at 1424. We also find that due process does not require disclosure of the identity of any person providing information leading to the placement of a prisoner in administrative segregation. _Cf_. _Toussaint III_, 597 F.Supp. 1424-25.

B. RETENTION

In Part III(B)(1) of the Permanent Injunction, the district court ordered defendants to release prisoners form administrative segregation on the prisoner's Minimum Eligible Release Date or at the expiration of twelve months of consecutive confinement, whichever is shorter, unless the defendants afford the prisoner all the hearing rights that attend initial placement in segregation.

In Hewitt, the Supreme Court instructed that administrative segregation --

> may not be used as a pretext for indefinite commitment of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates. This review will not necessarily require that prison officials permit the submission of any additional evidence of statements. The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner -- which will have been ascertained when determining to confine the inmate to administrative segregation -- and on the official's general knowledge of prison conditions and tensions, which are singularly unsuited for "proof" in any highly structured manner. Likewise, the decision to continue confinement of an inmate pending investigation of misconduct charges depends upon circumstances that prison officials will be aware of -- most typically, the progress of the investigation.

Hewitt, 459 U.S. at 477 n. 9, 103 S.Ct. at 874 n. 9. The Third Circuit, similarly, has stated "the governmental interest involved in a good faith decision to subject a prisoner to administrative segregation may fluctuate with the passage of time and change of circumstances." Mims v. Shapp, 744 F.2d. 946, 953 (3rd Cir. 1984).

[24] In Mims v. Shapp, the Third Circuit found that monthly review of a prisoner's status satisfied due process concerns. 744 F.2d at 952. Similarly, in Clark v. Brewer, the Eighth Circuit held that review every seven days for the first two months of segregation followed by regular review hearings every thirty days thereafter satisfied due process requirements. 776 F.2d at 234. Here, however, segregation may continue without review for as long as twelve months. We do not believe the annual review sufficiently protects plaintiffs' liberty interest. However, we intimate no view as to the frequency of periodic review

required. That is for the parties to recommend and the district court to decide in the first instance.

VI.

SUBSTANTIVE CRITERIA GOVERNING PLACEMENT AND RETENTION IN ADMINISTRATIVE SEGREGATION

[25] In Parts III(B) and IV(B) of the Permanent Injunction, the district court imposed criteria governing placement and retention of prisoners in administrative segregation. See 597 F.Supp. at 1424, 1426. The district court required that a prisoner not be placed or retained in segregation unless allowing the prisoner to remain in the general population would severely endanger the lives of prisoners, the security of the institution, or the integrity of an investigation into suspended criminal activity or serious

misconduct. Defendants argue that these criteria impose unwarranted limitations on prison management.

On their face, the substantive requirements merely restate the reasons justifying administrative segregation. See 15 Cal.Admin. Code § 3335(a). In Hewitt, the Supreme Court recognized that "[t]he safety of the institution's guard and inmates is perhaps the most fundamental responsibility of the prison administration." 459 U.S. at 473, 103 S.Ct. at 872. The substantive requirements accommodate this concern. The Court in Hewitt also stated that administrative segregation of a prisoner "pending investigation of charges against him serves important institutional interests relating to the insulating of possible witnesses from coercion or harm." Id. The substantive criteria accommodate the prison administration's interests in this regard as well. Moreover, the substantive criteria apply only to placement or retention in administrative segregation. The criteria do not impinge on defendant's ability to hold disciplinary hearings and to punish prisoners for misconduct. Since administrative segregation must not be a pretext for punitive isolation, Hewitt, 459 U.S. at 477 n. 9, 103 S.Ct. at 874 n. 9, the substantive criteria assure that plaintiffs' due process rights are not meaningless gestures. The district court, therefore, did not abuse its discretion in fashioning these substantive criteria.

VII.

THE INTERIM PERIOD REMEDIES

In Part IV of the Permanent Injunction, the district court established an additional layer of relief to apply during the "interim period." The court defined the interim period as that time between the date on which the Permanent Injunction issued and the date on which the Monitor[21] certifies that defendants are "in full compliance with the Permanent Injunction and that conditions of confinement in segregation units at San Quentin and Folsom do not violate the Constitution." 597 F.Supp. at 1425.[22] The court ordered that any prisoner assigned to segregation could request release and, if the defendants denied the request, the prisoner could obtain review by the Monitor to order the release of individual prisoners from administrative segregation. Id. at 1426.

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[21] The Monitor is a special master, appointed pursuant to Fed.R.Civ.P. 53. See 597 F.Supp. at 1425.

[22] Although Part IV of the Permanent
(Footnote Continued)

A. Habeas Corpus Jurisdiction

The defendants argue that the district court lacks jurisdiction under 42 U.S.C. § 1983 to order prisoners released from administrative segregation.[23]

(Footnote Continued)

Injunction speaks of "interim" relief, we question whether the district court can retain jurisdiction once the defendants meet the conditions specified in Part IV. See generally Riddick v. School Board of the City of Norfolk, 784 F.2d 521 (4th Cir. 1986). Of course, this litigation has not reached a point demanding resolution of this question.

[23] We note sua sponte that the district

(Footnote Continued)

Defendants contend that under Preiser v. Rodriquez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the writ of habeas corpus is the exclusive federal remedy

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(Footnote Continued)

court's delegation to the Monitor of the power to order release raises serious constitutional questions. See e.g., Northern Pipeling Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982); United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); Fiss, The Social and Political Foundation of Adjudication, 6 Law & Human Behav. 121 (1982); Note, Article III constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 Yale L.J. 1023 (1979). We have found no case in which such a broad delegation of power to a special master has withstood review. Nevertheless, the defendants do not object to the delegation of power to the Monitor; defendants contest the authority of the court itself to order the release of prisoners from administrative segregation. Therefore, we do not wish our silence to be taken as a ratification of the distict court's order.

available to a prisoner who seeks to challenge the fact of confinement, and that the district court's order evades the requirement that the prisoner exhaust state remedies. Preiser does not support defendants' contentions.

In Preiser, state prisoners sued in federal district court under 42 U.S.C. § 1983 alleging that they were deprived of goodtime credits improperly. 411 U.S. at 476, 93 S.Ct. at 1829. The prisoners sought injunctive relief to compel restoration of the credits. Id. The Supreme Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Id. at 500, 93 S.Ct. at 1941.[24]

In Wolff v. McDonnell, 418 U.S. 539, 554-55, 94 S.Ct. 2963, 2973-74, 41 L.Ed.2d 935 (1974), however, the Supreme Court held that Preiser only precludes restoration of credits under 42 U.S.C. § 1983. The Court stated "that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled." *Id.* at 555, 94 S.Ct. at 2974 (footnote omitted; emphasis added).

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[24] The Court also stated in dictum that "when a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal." Id. 411 U.S. at 499, 93 S.Ct. at 1841. One court has followed this reasoning and held that habeas corpus provided the exclusive remedy for obtaining an order compelling release from administrative detention. Boudin v. Thomas, 732 F.2d 1107, 1111-12 (2d Cir. 1984).

[26] Here, the district court did not restore credits nor release any prisoner from prison. The court, in essence, authorized the Monitor to move individual prisoners from one location to another within the prison. We do not believe that such relief falls within the traditional core of habeas corpus. Consequently, the plaintiffs need not exhaust state remedies before seeking relief in federal court. The district court did not exceed its jurisdiction by authorizing the release of prisoners from administrative segregation.

B. Standard of Review Employed by the Monitor

Part IV(D) of the Permanent Injunction authorizes the Monitor to review records of defendants' placement and retention decisions, to accept additional evidence, and to order a prisoner's release "[i]f the Monitor concludes on the basis of all evidence submitted, that the prisoner was placed or retained in segregation in violation of any provision of [the] Permanent Injunction ...." 597 F.Supp. at 1416. Defendants argue that the district court abused its discretion by authorizing the Monitor to review defendants' placement and retention decisions *de novo*.

We have already determined that the district court properly imposed substantive standards to be used in deciding whether to segregate a prisoner or retain a prisoner in segregation. The question here is who should apply those standards and how much evidence is required in support of a segregation or retention decision.

Prison administrators, not courts, must run prisons:

> [A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators. In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on purely subjective evaluations and on predictions of future behavior; indeed, the administrators must predict not just

> one inmate's future actions, as in parole, but those of an entire institution.

Hewitt, 459 U.S. at 474, 103 S.Ct. 873 (citations omitted); see also Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132-33, 97 S.Ct. 2532, 2541, 53 1.Ed.2d 629 (1977).

Courts must accord wide-ranging deference to prison administrators "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979). "[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." Procunier v. Martinez, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224

(1974). We recognize, moreover, "that 'the relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a state and a private citizen,' and that the "internal problems of state prisons involve issues ... peculiarly within state authority and expertise.'" Pell v. Procunier, 417 U.S. 817, 825-26, 94 S.Ct. 2800, 2805, 41 L.Ed.2d 495 (1974) (quoting Preiser v. Rodriquez, 411 U.S. 475, 492, 93 S.Ct. 1827, 1837, 36 L.Ed.2d 439 (1973)). The need to restrict injunctive relief to enforcement of minimum constitutional rights is especially great when federal judicial relief threatens to usurp such highly discretionary state functions.

The Supreme Court's decision in Superintendent v. Hill, _____ U.S. ____, 105 S.Ct. 2768, 86 L.Ed2d 356 (1985), indicates that the due process clause requires only the existence of "some evidence" in support of a prison administrator's segregation decision. Id. at 2770.

In Hill, the plaintiff, a prisoner, was charged with misconduct for assaulting another inmate. Id. At the disciplinary hearing, a guard testified that he heard a scuffle, found the victim bleeding from the mouth, and observed the plaintiff and two other inmates jogging away down an enclosed corridor. Id. No evidence was adduced concerning which of the three retreating inmates caused the victim's injuries. Id. The victim provided written statements that the other inmates had not caused his injuries. Id. The prison disciplinary board withdrew 100 days of plaintiffs' good time credit and ordered that plaintiff be confined in isolation for 15 days. Id. The plaintiff challenged the prison administration's decision in state court, which granted summary judgment in plaintiff's favor. Id. The Massachusetts Supreme Court affirmed on the ground that the record failed to reflect any evidence that would support the disciplinary board's findings. Id. at 2771. The United States Supreme Court reversed. Id.

The Court held that "revocation of good time does not comport with minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in the record." Id. at 2773 (citations omitted). The Court held that the evidence recited above was sufficient. Id. at 2775. The Court's reasoning merits recitation at length:

Where a prison has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily. This interest, however, must be accommodated in the distinctive setting of a prison, where disciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." Consequently, in identifying the safeguards required by due process, the Court has recognized the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation.

Requiring a modicum of evidence to support a decision to revoke good time credits will help to prevent arbitrary deprivations without threatening institutional interests imposing undue administrative burdens.

. . . . .

Because the written statement mandated by Wolff requires a disciplinary board to explain the evidence relied upon, recognizing that due process requires some evidentiary basis for a decision to revoke good time credits will not impose significant new burdens on proceedings with the prison. Nor does it imply that a disciplinary board's factual findings or decisions with respect to appropriate punishment are subject to second-guessing upon review.

We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced ..." Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside

> decisions of prison administrators that have some basis in fact.

Id. at 2774 (quotations and citations omitted, emphasis added).

[27,28] The Court's decisions in Hewitt and Hill lead to two conclusions: First, the exigencies of prison administration allow prison administrators to make segregation decisions on the basis of "some evidence," including the administrator's evidence and awareness of general prison conditions; second, a reviewing court may not reverse the administration's decision if "some evidence" supports the administration's decision.

[29] Plaintiffs seek to distinguish Hill on the basis that "the issue before this Court is not what due process requires, but rather, whether the district court abused its discretion in formulating a remedy for proven

violations of the Constitution (including Eighth Amendment Rights)." We reject this argument for reasons similar to those we gave in holding that eighth amendment violations do not create a liberty interest. See supra pages 1093-94. A prisoner who presents a clear security risk enjoys exactly the same eighth amendment protection as does the most placid prisoner. The fact that justification exists for segregating a particular prisoner will not assuage his sufferings. Therefore, close scrutiny of prison officials' segregation decisions will do little to protect plaintiffs' eighth amendment rights.[25]

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[25] Moreover, if Judge Savitt's conclusions regarding the conditions in the general population are correct, see supra note 12, interfering in segregation decisions, would be futile, at least as
(Footnote Continued)

[30,31] We also do not consider the defendants' history of noncompliance with prior orders to constitute a valid reason for this court to arrogate to itself the discretion imposed on the defendants. The earlier orders demanded much more of the defendants than the law now requires. Our purpose is not to punish defendants for their past failures, but to enforce compliance with current constitutional standards. We perceive no reason why the defendants would be unwilling to comply with the requirements we have established. But even if defendants failed to comply, de novo review by the court or the Monitor would be unwarranted. The district court could assure itself that the defendants

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(Footnote Continued)

far as the San Quentin plaintiffs are concerned.

were complying with the constitution simply by examining the record for "some evidence" in support of each challenged segregation decision. The district court abused its discretion by allowing the Monitor to substitute his discretion for that of the defendants.[26]

VIII.

THE WORK REQUIREMENT

In Part III(C) of the Permanent Injunction, the district court ordered that no prisoner assigned to administrative segregation be denied the opportunity to participate in work, education, or vocational training programs. 597 F.Supp. at 1425.

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[26] We note that Part IV(D) of the Permanent Injunction appears to allow a segregated prisoner to obtain repeated review of his status. As we have discussed above, due process requires only reasonable periodic review. See Clark v. Brewer, 776 F.2d at 234. On remand, if the district court decides that review by the court or the Monitor is required, the court shall not require more frequent review than is necessary to protect plaintiffs' due process rights.

A. Due Process

[32,33] Plaintiffs contend that Part III(C) is necessary to the enforcement of plaintiffs' due process rights. This is not true. Requiring prison officials to provide work programs is an inappropriate remedy. The due process clause seeks to prevent denial of life, liberty or property by arbitrary decision. Hewitt, 459 U.S. at 7, 103 S.Ct. at 873; Greenholtz, 442 U.S. at 7, 99 S.Ct. at 2103. The due process clause requires procedure. See Mathews v. Eldridge, 424 U.S. at 335, 96 S.Ct. at 903. The district court's order, however, does not relate to

endorsement of procedural protections. The work requirement relates only to the conditions of confinement. To the extent Part III(C) merely constitutes an enforcement of state law, it violates the eleventh amendment. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 97-121, 104 S.Ct. 900, 906-919, 79 L.Ed.2d 67 (1984).

B. Eighth Amendment

[34] In Hoptowit v. Ray, 682 F.2d at 1254-55, 1258, we held that "[i]delness and the lack of programs are not eighth amendment violations. The lack of these programs simply does not amount to the infliction of pain." The district court recognized this language as controlling. 597 F.Supp. at 1414.

Plaintiffs,[27] nonetheless, urge us to

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[27] Plaintiffs failed to brief this issue in their opposition brief and opening brief on cross-appeal, but instead refer us to the briefs filed by amici, the Bar Association of San Francisco, the San Francisco Lawyers Committee on Urban Affairs, and the California Attorneys for Criminal Justice. Defendants object to consideration of this issue on the basis that an argument made on appeal by amici, but not by the parties, is not properly before the reviewing court. In each of the cases cited by defendants, the courts refused to consider issues not raised by the parties. See United States Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 n. 2, 101S.Ct. 1559, 1562 n. 2, 67 L.Ed.2d 732 (1981); Bell v. Wolfish, 441 U.S. 520, 531 n. 13, 99 S.Ct. 1861, 1870 n. 13, 60 L.Ed.2d 447 (1979); Nietsch v. United States, 364 U.S. 361, 370, 81 S.Ct. 132, 137, 5 L.Ed.2d 128 (1970); Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 83 (Temp.Emer. Ct.App. 1981), cert denied, 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982); National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157, 160 n. 3 (7th Cir. 1977), cert. denied, 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978). In the instant case, however, plaintiffs raised the issue but failed to breif it. Moreover, plaintiffs argue this issue in their reply brief on

(Footnote Continued)

reverse the district court's decision that enforced idleness is not a violation of the eighth amendment. Plaintiffs implicitly urge us to overrule Hoptowit v. Ray.

To arrive at the desired result, plaintiffs believe that two logical steps must be taken. First, plaintiffs urge us

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(Footnote Continued)

cross-appeal. The plaintiffs obtained leave of court to file the 75 page brief. The amici briefs add 39 pages of argument in support of plaintiffs' request on this issue. By incorporating amicis' arguments by reference, plaintiffs have circumvented the page limits set by the court.

Although we do not condone such practices generally, we recognize that this case presents a number of weighty constitutional issues. The defendants have had every opportunity to respond to the arguments of plaintiffs and amici and, in fact, have briefed this issue. Justice would not be served by ignoring the amicis' arguments. Therefore, we exercise our discretion to consider this issue.

To avoid confusion, henceforth, we will refer to plaintiffs and amici solely as plaintiffs.

to clarify the language in our prior opinions regarding the proper framework for analyzing an alleged eighth amendment violation. Second, plaintiffs urge us to reject or limit our holding in *Hoptowit v. Ray*, regarding idleness.

[35] In *Hoptowit v. Ray*, we considered the eighth amendment analytical framework at length. *See* 682 F.2d at 1246-47. Our discussion leads to the undeniable conclusion that we follow the "related condition" approach urged by plaintiffs. Plaintiffs object, however, to one statement in *Hoptowit*. In *Hoptowit* we stated, *inter alia*, that "[a] number of conditions, each of which satisfy Eighth Amendment requirements, cannot in combination amount to an Eighth Amendment violation." 682 F.2d at 1247. To the extent that this sentence creates uncertainty or

ambiguity regarding the analytical framework employed in this circuit, such uncertainty or ambiguity may be rectified easily. We meant that a number of _unrelated_ conditions, each of which satisfy eighth amendment requirements, cannot in combination amount to an eighth amendment violation. _See_ _Wright v. Rushen_, 642 F.2d at 1133.

Plaintiffs contend that _Hoptowit v. Ray_, ignores related conditions by creating a per se rule that enforced idleness does not constitute cruel and unusual punishment. Plaintiffs argue that by applying _Hoptowit's_ per se rule, the district court failed to consider related conditions that, when combined with enforced idleness, would create a cruel and inhuman situation.

[36] Plaintiffs' arguments are unpersuasive for several reasons. First,

related conditions are those conditions that combine to deprive a prisoner of a discrete basic human need. Hoptowit v. Ray, 682 F.2d at 1246. The discrete basic human needs that prison officials must satisfy include food, clothing, shelter, sanitation, medical care, and personal safety. Id.; Wright v. Rushen, 642 F.2d at 1132-33. Enforced idleness, taken alone, simply does not deprive a prisoner of any of these basic needs. See Hoptowit v. Ray, 682 F.2d at 1254-55.[28]

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[28] Although medthods of analysis differ, each circuit that has considered the issue has held that enforced idleness does not constitute cruel and unusual punishment. See Jackson v. Meachum, 699 F.2d 578, 581-85 (1st Cir. 1983) (cataloging decisions of other circuits); see also Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981); Ramos v. Lamm, 639 F.2d 559, 566-67 (10th Cir. 1980), cert. denied 450 U.S. 1041, 101 S.Ct.

(Footnote Continued)

Second, plaintiffs do not identify any condition that would support a finding that enforced idleness created an eighth amendment violation in this case. Plaintiffs point to the violence and psychological pain that enforced idleness engenders. Related conditions, however, are not those that result from another condition, but those that in combination

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(Footnote Continued)

1759, 68 L.Ed.2d 239 (1981); Bono v. Saxbe, 620 F.2d 609, 614-15 (7th Cir. 1980); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); Sweet v. South Carolina Department of Corrections, 529 F.2d 854, 861 (4th Cir. 1975); Sostre v. Mcginnis, 442 F.2d 178, 192-93 (2nd Cir. 1971), cert. denied 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972). The expert opinions cited by plaintiffs are entitled to little weight in determining whether a particular condition constitutes cruel and unusual punishment. Rhodes v. Chapman, 452 U.S. 337, 348 n. 13, 101 S.Ct. 2392, 2400 n. 13, 69 L.Ed.2d 59 (1981). We adhere to our holding in Hoptowit v. Ray.

create a cruel and unusual punishment. See, e.g. Wright v. Rushen, 642 F.2d at 1134; Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979). In reality, plaintiffs urge us to hold as a matter of law that "lengthy enforced idleness does not comport with contemporary standards of decency, and that work, educational, and vocational programs are constitutionally mandated." Plaintiffs, therefore, implicitly ask us to overrule Hoptowit v. Ray, and create a per se rule to the contrary.

Third, even if we held that enforced idleness in administrative segregation constitutes cruel and unusual punishment, it does not follow that mandating work programs is the appropriate remedy. An injunction must be narrowly tailored to cure the constitutional violation and must not intrude on the functions of state officials unnecessarily. We would violate this principle by holding as a matter of law that provision of work programs is the necessary remedy for enforced idleness. See supra note 4; Grummett v. Rushen, 779 F.2d at 496-97 (Sneed, J., concurring).

Fourth, whether or not Hoptowit states a per se rule, the district court did not apply it as such. Plaintiffs distort the district court's factual findings and legal reasoning to create the impression that the district court failed to consider the effect of enforced idleness on the plaintiffs. The district court, however, considered several factors in concluding that idleness did not rise to an eighth amendment violation. The court stated that --

> the denial of programs to plaintiffs is not 'totally without penological justification.' At least in theory, each plaintiff has been selected for

> segregation on the basis of criteria indicating that he is in some way unfit or unsuited for intermingling with other inmates, whether because he has misbehaved, because he presents a threat to the safety of other inmates, or because he has requested isolation from other inmates for his own protection.

597 F.Supp. at 1414. The district court, therefore, did not blindly follow a per se approach.[29/]

[37] The plaintiffs' argument largely depends on the assertion that enforced idleness engenders a high degree

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[29/] Regardless of the ambiguity in this circuit's description of the eighth amendment analytical framework, it is abundantly clear that the district court adopted and applied the related conditions approach throughout its opinion. See e.g. 597 F.Supp. at 1408 (if all other conditions are satisfactory, segregating inmates in small cells is not eighth amendment violation); id. at 1409 (under prevailing conditions, double celling is cruel and inhuman); id. at 1411 (conditions of filth require that inmates be provided with hot running water or periodic showers.)

of violence. Plaintiffs attempt to draw a close connection between enforced idleness and violence in the instant case by stating that "The District Court specifically found that '[l]ockup units at San Quentin and Folsom are counted among the most violence-racked correctional facilities in the United States.... In part, it may be due to the fact that lockup units have no programs.'" The district court's findings indicate that the connection between violence and enforced idleness in administrative segregation is substantially more attenuated than plaintiffs would have us believe. The district court stated in full:

> Lockup units at San Quentin and Folsom are counted among the most violence-racked correctional facilities in the United States. In part, this is due to the California Department of Corrections policy of concentrating the most violence-prone offenders in these

> two institutions. In part, it is caused by the horrendous physical conditions, including double-celling. In part, it is due to the fact that lockup units have no programs. But in large measure, it originates in the violent propensities of segregated inmates themselves.

597 F.Supp. at 1404-05.

The plaintiffs' argument also depends on the assertion that enforced idleness inflicts psychological pain without penological justification. Again, plaintiffs ignore the actual findings and reasoning of the district court. The district court expressly found that "denial of programs is not totally without penological justification." 597 F.Supp. at 1414. Plaintiffs' argument that the district court failed to consider related conditions, therefore, is incorrect.

We vacate Part III(C) of the Permanent Injunction. The administration of state-created work programs is the province of prison officials, not of the district court.

IX.

ACCESS TO THE PRISON LAW LIBRARY

In Part II(15) of the Permanent Injunction, the district court ordered defendants to allow segregated prisoners access to the prison law library as reasonably necessary, absent documented security reasons. 597 F. Supp at 1424. The court found that the "paging system"[30] in use at San Quentin and Folsom rendered effective legal research virtually impossible. Id. at 1403. However, the district court allowed the defendants to deny physical access to the libraries to those plaintiffs who are documented security risks. Id. at 1424. The court specified that any prisoner denied access to the libraries be permitted to order five books per week, which would be delivered to the prisoner's cell. Id.

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[30] A paging system allows a prisoner to request specific volumes. The significant features of such a system are that the prisoner must know in advance which volumes he will need to review and that the process of ordering and returning books drastically prolongs legal research.

In Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), the Supreme Court held that prisoners have a constitutional right of access to the courts which in turn requires prison authorities to provide prisoners with adequate law libraries or adequate assistance from persons trained in the Law. Id. at 828, 97 S.Ct. at 1498; see

Lindquist v. Idaho State Board of Corrections, 776 F.2d 851, 855 (9th Cir. 1985). In Lindquist, we recognized that

> The existence of an adequate law library does not provide for meaningful access to the courts if the inmates are not allowed to use the library. However, the Constitution does not guarantee a prisoner unlimited access to a law library. Prison officials of necessity must regulate the time, manner, and place in which library facilities are used. The fact that an inmate must wait for a turn to use the library does not necessarily mean that he has been denied meaningful access to the court.

Id. at 858 (citations omitted).

Defendants do not challenge the validity of the district court's factual findings. Defendants argue that the district court should have limited injunctive relief to remedying the deficiencies in the paging system. Plaintiffs argue that the district court did not abuse its discretion in ordering physical access absent compelling security needs. Plaintiffs also argue, however, that the district court abused its discretion by failing to require defendants to provide legal assistance to inmates barred from physical access.

The district court's order accommodates defendants' interests by allowing them to limit physical access to the law library. They need only permit reasonably necessary use. Moreover, even if a segregated inmate needs to use the law library, defendants may preclude physical access if such access would interfere with institutional security.

The Defendants interpret the portion of the court's order allowing limited use of the paging system as an acknowledgement of the efficacy of the system. This interpretation is incorrect. The district court expressly found that the paging system significantly impairs effective legal research. 597 F.Supp. at 1403., 1413. Allowing a limited use of the paging system merely recognizes defendants' interest in institutional security.

Plaintiffs contend that even as "improved" by the district court, the paging system is constitutionally deficient. This argument has merit. In Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978), cert. denied, 441 U.S. 911, 99 S.Ct. 2825, 61 L.Ed.2d 276 (1979), the Fourth Circuit held that allowing a prisoner physical access to a law library for 45 minutes a day, three days a week did not constitute a meaningful opportunity to conduct legal research. Id. at 1340. Presumably, a prisoner could examine more that five books in that amount of time. The Williams court noted that

> Ordinarily, a prisoner should have direct access to a law library if the state chooses to provide a prison law library as its way of satisfying the mandate of Bounds. Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful change to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Id. at 1339.

Th Williams court permitted the state to use a paging system when the state did not rely solely on access to a law library to satisfy Bounds. In Williams, Virginia and South Carolina provided state-funded legal counsel or trained legal assistants to prisoners contesting the legality or conditions of confinement. Id.

Plaintiffs in the instant case request research assistance for all prisoners denied physical access to the law libraries. The great weight of authority in the courts of appeals supports plaintiffs' requests. See Nordgren v. Milliken, 762 F.2d 851, 853-55 (10th Cir. 1985) (state provided access to courts by providing legal assistance in drafting pleadings), cert. denied, _____ U.S. _____, 106 S.Ct. 593, 88 L.Ed.2d 573 (1986); Williams v. Wyrick, 747 F.2d 1231, 1232 (8th Cir. 1984) (state satisfied Bounds by providing two inmate paralegals and one runner to procure law books, copy material and research legal questions for 23 death-row inmates); Corgain v. Miller, 708 F.2d 1241, 1247-50 (7th Cir. 1983) (where state actually provided legal assistance, access to legal materials could be restricted); Holtz v. Pitts, 702 F.2d 639, 640-41 (6th Cir. 1983) (state may deny physical access to law library to ensure security when prisoner has access to person trained in law); Rich v. Zitnay, 622 F.2d 41, 43 (1st Cir. 1981) (state must show alternatives to access to prison library satisfy Bounds); Williams v. Leeke, 584 F.2d at 1339. Cf. Arsberry v. Sielaff, 586 F.2d 37, 44 (7th Cir. 1978) ("as long as adequate alternatives are available in light of legitimate penological objectives, a limitation on a prisoner's constitutional rights will not be deemed impermissible"). Moreover, plaintiffs' suggested remedy would not be overly intrusive. The defendants would only be

required to provide legal assistance to those prisoners that defendants deem to be a security risk.

[38] Therefore, we conclude that all prisoners are entitled to meaningful access to the courts. If the state denies a prisoner reasonable access to a law library, the state must provide that prisoner legal assistance. If the parties fail to agree on a plain that provides meaningful access to the courts, the district court shall fashion one that comports with the requirements established in this opinion.

X.

ACOUSTICAL WALL COVERINGS

In Part II(6) of the Permanent Injunction, the district court ordered defendants to install, inter alia, sound-absorbing wall coverings in the five-tier units. 597 F.Supp. at 1423. Defendants do not object to the district court's conclusion that the level of noise in the five tier units inflicts pain without penological justification. They contest the court's remedy. They argue that wall coverings would not reduce the noise perceptibly and would be costly.

[39,40] The fact that a remedy is costly does not preclude a district court from ordering the remedy. Hoptowit, 682 F.2d at 1247. The testimony of defendants' expert witness supports the conclusion that the remedy ordered by the court would reduce the noise levels perceptibly. The district court's choice of remedy was a proper exercise of discretion.

XI.

ADJUSTABLE HOT AND COLD WATER CONTROLS

In Part II(10) of the Permanent Injunction, the district court ordered that the shower facilities used by inmates in segregation be equipped with adjustable valves for hot and cold water. 597 F.Supp. at 1423. The court found showers necessary to protect the plaintiffs' interest in proper shelter, sanitation, and medical care. Id. at 1399-1400, 1411.

The defendants contend that the remedy was too intrusive. Defendants claim that the district court could have required defendants to provide warm water, rather than hot and cold water.

[41] The court's order is not overly intrusive. The requirement that defendants install hot and cold water controls will necessitate the expenditure

of public funds. Defendants, however, do not complain that the cost would be prohibitive. Nor do defendants complain that adjustable controls will interfere with prison security or other legitimate penological concerns. Most importantly, requiring defendants to install adjustable controls will not not affect the daily operation of the prison. the adjustable controls will encourage showering and help reduce the adverse effects of confinement in a filthy environment.

We uphold Part II(10) of the Permanent Injunction.

XII.

HEALTH CARE AT FOLSOM

The district court determined that the system of health care at Folsom does not manifest deliberate indifference to the serious medical needs of the prisoners. See 597 F.Supp. at 1414. Plaintiffs appeal this conclusion in respect to several aspects of Folsom's health care system. We will discuss each separately.

A. Access to Medical and Psychiatric Care

The district court found that Folsom employs five physicians, two psychiatrists, and a psychologist to care for 3,500 prisoners. 597 F.Supp. at 1403-04. Medical technical assistants (MTAs) screen inmate complaints. *Id.* at 1404. MTAs conduct sick call in the lockup units on a daily basis. *Id.* A physician passes by the cells once a week. *Id.* MTAs generally determine which inmates will be sent to the infirmary for medical treatment. *Id.* However, inmates will be allowed to consult a physician if they insist. Id. The court found "that while there may be isolated exceptions, Folsom provides most strictly 'necessary' treatment on a timely, medically sound basis." Id.

[42,43] Denial of a medical attention to prisoners constitutes an eighth amendment violation if the denial amounts to deliberate indifference to serious medical needs of the prisoners. Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976). "Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to medical staff." Hoptowit v. Ray, 682 F.2d at 1253. The district court found that segregated inmates could be examined or treated by a doctor during the weekly visit or insist on an earlier appointment. Folsom,

therefore, does not deliberately deny or delay a prisoner's access to medical care. See Estelle v. Gamble, 429 U.S. at 104-05, 97 S.Ct. at 291. Plaintiffs' citations to isolated occurrences of neglect do not amount to a constitutional violation. "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence *deliberate* indifference to serious medical needs." Gamble, 429 U.S. at 106, 97 S.Ct. at 292. (emphasis added).

B. Use of Unqualified Medical Personnel

[44] Plaintiffs argue that defendants place an unconstitutional degree of reliance on MTAs, registered nurses (RNs), and inmate workers. The district court found that the MTAs screen inmates and administer nonprescription

drugs. 597 F.Supp. at 1404. Plaintiffs cite testimony indicating that MTAs, RNs, and inmates provide a number of services which they are not qualified to perform. Defendants respond that MTAs, RNs and inmates are qualified to perform a number of services. If plaintiffs correctly contend that unqualified personnel regularly engage in medical practice, precedent indicates that the prison health care delivery system may reflect deliberate indifference to plaintiffs' medical needs. See Hoptowit v. Ray, 682 F.2d at 1252 (district court correctly found eighth amendment violation where, inter alia, medication was prepared and dispensed by unqualified personnel). Therefore, we must remand for entry of explicit factual findings regarding the nature of services performed by MTAs, RNs and inmates, their level of medical qualification, and the level of qualification required to adequately render the services that they perform.

C. Confidentiality of Records

[45] Plaintiffs argue that constitutionally adequate medical care cannot be provided without complete medical records, and that medical records are inadequate if they lack confidentiality. Plaintiffs cite Williams v. Edwards, 547 F.2d 1206, 1216 (5th Cir. 1977), for the proposition that medical records are inadequate if they lack confidentiality. In Williams v. Edwards, inmate medical assistants failed to keep any medical records of certain procedures. Id. Nothing in Williams v. Edwards, indicates a casual connection between lack of confidentiality and

inadequacy of records. We reject plaintiffs' argument.

D. Lack of Special Medical Diets

[46] The district court found that the only special diet available at Folsom is one designed for treating ulcers. 597 F.Supp. at 1404. Prisoners needing other special diets must await transfer to another institution. Id. Plaintiffs argue that so long as prompt transfers are unavailable, failure to provide special diets is unconstitutional. We disagree. A fair reading of the district court's findings of fact indicated that if a prisoner needs a special diet, eventually he will be transferred to an institution that is equipped to provide it. Neither precedent nor common sense suggests that delay in providing a special diet arises to the level of

deliberate indifference. The district court did not abuse its discretion by refusing to order defendants to provide special diets.

E. Medical Facilities

[47] The district court found that in comparison with other parts of the prison, the Folsom infirmary is relatively clean, but that sanitation failed to meet medical standards. 597 F.Supp. at 1404. Plaintiffs argue that inadequate and unsanitary health care facilities violate the eighth amendment.

Plaintiffs' authorities do not support such a broad proposition. In Williams v. Edwards, 547 F.2d at 1217, a "filthy" emergency room was but one factor in determining the existence of deliberate indifference. The filth included the storage of live fish in a whirlpool bath. Id. In Newmann v. Alabama, 503 F.2d 1320, 1323 (5th Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975), the lack of sanitation included the cleaning of linens from patients with hepatitis and tuberculosis along with the linens of other infirmary inmates.[31] In

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[31] The lack of health care in the Alabama prisons, which were the subject of Newmann v. Alabama, provides a stark contrast with the level of health care at Folsom:

> Immediately before [court] intervention, medical services for Alabama's almost 4,000 prisoners were provided largely at a state medical and diagnostic center. The center maintained no full-time physician; instead, care was provided by three private doctors working part-time at the center, three registered nursed, eight unlicensed former military medics, and a part-time dentist. Facilities at individual prisons were even worse. One unit housing 850

(Footnote Continued)

Lightfoot v. Walker, 486 F.Supp. at 512, surgical instruments were not sterilized, the surgical suite was not cleaned routinely, and clean and soiled linens were stored together.

Unlike Lightfoot and Williams, surgery is not performed at the Folsom infirmary. 597 F.Supp. at 1404. Unlike Williams, the Folsom infirmary is not subject to vermin infestation. Id.

(Footnote Continued)

> inmates, for example, had no full-time physician and a dentist available only one-half day of each week. Because of understaffing, unsupervised and untrained inmates regularly provided medical services, including minor surgery. The horror stories coming out of such a setting were numerous. Bedsores of a quadraplegic who spent many months at the medical and diagnostic center, for example, became infested with maggots. In the month before his death, he was bathed and his bandages changed, only once.

Yarbrough, The Alabama Prison Litigation, 9 Just. Sys.J. 276, 277 (1984) (citations omitted).

Unlike Newmann, there is no indication in this case that infirmary officials were so callous to the health needs of the inmates as to mix the laundry of patients with highly communicable infectious diseases with that of the general infirmary inmates. Id.

F. Conclusions Regarding Health Care at Folsom

In sum, Folsom's health care conditions fall below medical standards. The fact that a given condition might constitute medical malpractice, however, does not necessarily mean that the condition constitutes cruel and unusual punishment. Estelle v. Gamble, 429 U.S. at 106, 97 S.Ct. at 292. It is only deliberate indifference to serious medical needs that can offend "evolving standards of decency" in violation of the eighth amendment. Id. However, the district court's failure to render specific factual findings regarding the level of reliance on unqualified personnel requires a remand for entry of such findings.

XIII.

CONTACT VISITATION

The district court held that denial of contact visits to inmates in administrative segregation does not constitute cruel and unusual punishment. 597 F.Supp. at 1413.

Plaintiffs assert that the district court improperly applied a *per se* rule. They urge us to remand the case to the district court with instructions to reconsider whether all prisoners in administrative segregation in San Quentin and Folsom are entitled to individualized determinations on their suitability for contact visits.

[48] Plaintiffs cite no authority for the proposition that denial of contact visits constitutes cruel and unusual punishment. Instead, they argue that the evidence adduced at trial demonstrates that contact visitation would have beneficial rehabilitative effects. They contend that "there was unanimity of evidence that contact visits thus are vital to inmate health, as the deprivation of human contact involves extreme suffering and affects both physical and mental health."

[49] Judicial authority uniformly contradicts plaintiffs' assertions. See Ramos v. Lamm, 639 F.2d 559, 580 n. 26 (10th Cir. 1980) ("weight of present authority clearly establishes that there is no constitutional right to contact

visitation ... We agree with this view."), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981); Lynott v. Henderson, 610 F.2d 340, 342 (5th Cir. 1980) ("convicted prisoners have no absolute constitutional right to visitation."); Feeley v. Sampson, 570 F.2d 364, 372-73 (1st Cir. 1978) ("we can discover no constitutional guarantee that [contact visits] may take place."); Oxendine v. Williams, 509 F.2d. 1405, 1407 (4th Cir. 1975) ("[prisoner] has no constitutional right to physical contact with his family."); see also Smith v. Coughlin, 748 F.2d 783, 788 (2d Cir. 1984) (contact visits with persons other than priest, lawyer, and doctor could disrupt prison administration, create security risks, and allow smuggling of contraband; denial of contact visits did not violate prisoners' first amendment rights); O'Bryan v. County of Saginan, 741 F.2d 283, 284-85 (6th Cir. 1984) (denial of contact visits for pretrial detainees did not violate constitution); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 758-60 (3rd Cir. 1979) (ban on contact visits does not violate due process rights of prisoners). Expert opinion is entitled to little weight in determining whether a punishment is cruel and unusual. See Rhodes v. Chapman, 452 U.S. at 348 n. 13, 101 S.Ct. at 2400 n. 13. Plaintiffs' argument, therefore, lacks support. Denial of contact visitation simply does not amount to the infliction of pain. Cf.Hoptowit v. Ray, 682 F.2d at 1254-55.

[50] Even if denial of contact visitation amounted to an infliction of pain, the eighth amendment would not prohibit the denial unless the pain were

inflicted wantonly and without penological justification. Rhodes v. Chapman, 452 U.S. at 346, 101 S.Ct. at 2399. The district court found that no segregated inmate was deprived of all visits and most were allowed contact visits. 597 F.Supp. at 1413. The court found that despite thorough searches, contact visits result in the smuggling of contraband, particularly drugs. Id. at 1403. The court commended defendants for their efforts to improve visiting facilities at Folsom. Id. at 1413 n. 44. The court noted that San Quentin was one of the very few maximum security prisons in the nation to allow conjugal visitation for any of its inmates. Id. at 1402 n. 25. The court's findings hardly indicate that defendants wantonly inflict pain on the plaintiffs. To the contrary, the district court's findings indicate that denial of contact visitation is based on sound penological justifications.[32/]

To the extent that denial of contact visitation is restrictive and even harsh, it is part of the penalty that criminals pay for their offenses against society. Cf. Rhodes v. Chapman, 452 U.S. at 347, 101 S.Ct. at 2399.

[32/] Plaintiffs fault the district court for relying on Block v. Rutherford, 468 U.S. 576, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984). In Block, the Supreme Court held that denial of contact visits to pretrial detainees did not violate due process. Id. at 589, 104 S.Ct. at 3233. As plaintiffs assert, Block is distinguishable on the basis that the pretrial detainees in Block were subject to denial of contact visitation only for a limited period of time. Cf. Hutto v. Finney, 437 U.S. at 686-87, 98 S.Ct. at 2571 (conditions tolerable for a short period of time are intolerable for a long period of time). The fact that Block is distinguishable, however, does not improve plaintiffs position.

XIV.

CONCLUSION

For the reasons stated above, we direct as follows:

1. We reverse the district court's conclusion that Cal. Penal Code §§ 2931, 2933 create a liberty interest triggering due process protections. The Wright I order is vacated. Parts III and IV(D) of the Permanent Injunction are vacated. All release orders are vacated. We hold, however, that 15 Cal.Admin. Code § 3339(a) creates a liberty interest. On remand, the district court shall determine whether the defendant's segregation procedures meet the due process requirements as stated above. If the district court determines that defendants' procedures do not meet the requirements stated above, and that the defendants are unlikely to comply

voluntarily, the district court shall order such relief as it deems necessary to obtain compliance.

2. The district court's conclusions and order regarding noise reduction (Part II(6)) and adjustable controls for hot and cold running water (Part II(10)) are affirmed.

3. The district court's conclusions and order regarding access to the prison law library (Part II(15)) are affirmed to the extent that the court required defendants to permit segregated prisoners access to the law library. The district court's conclusions are reversed and its order vacated to the extent that the court allowed defendants to rely on a paging system for those prisoners who are denied access because of security reasons. On remand, the district court shall determine how best to accommodate

plaintiffs' right to meaningful access to the courts and defendants' interest in institutional security and economy.

4. The district court's conclusions that denial of work programs and contact visitation does not constitute cruel and unusual punishment are affirmed.

5. The district court's conclusion that the health care system at Folsom does not constitute cruel and unusual punishment is affirmed. However, on remand the district court, if necessary, shall render explicit factual findings regarding the qualifications of personnel rendering medical services in order to allow further appellate review.

6. Each party shall bear its own costs.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.

APPENDIX

Ninth Circuit Opinion

Cal. Penal Code § 2931. Reduction of term for good behavior and participation; conditions

(a) In any case in which a prisoner was sentenced to the state prison pursuant to Section 1170, or if he committed a felony before July 1, 1977, and he would have been sentenced under Section 1170 if the felony had been committed after July 1, 1977, the Department of Corrections shall have the authority to reduce the term prescribed under such section by one-third for good behavior and participation consistent with subdivision (d) of Section 1170.2. A document shall be signed by a prison official and given to the prisoner, at the time of compliance with Section 2930, outlining the conditions which the prisoner shall meet to receive the credit. The conditions specified in such document may be modified upon any of the following;

(1) Mutual consent of the prisoner and the Department of Corrections.

(2) The transfer of the prisoner from one institution to another.

(3) The department's determination of the prisoner's lack of adaptability or success in a specific program or assignment. In such case the prisoner shall be entitled to a hearing regarding the department's decision.

(4) A change in custodial status.

(b) Total possible good behavior and participation credit shall result in a four-month reduction for each eight months served in prison or in a reduction based on this ratio for any lesser period of time. Three months of this four-month reduction, or a reduction based on this ration for any lesser period, shall be based upon forbearance from any act for which the prisoner could be prosecuted in a court of law, either as a misdemeanor of a felony, or any act of misconduct described as a serious disciplinary infraction by the Department of Corrections.

(c) One month of this four-month reduction, or a reduction based on this ratio for a lesser period, shall be based solely upon participation in work, educational, vocational, therapeutic or other prison activities. Failure to succeed after demonstrating a reasonable effort in the specified activity shall not result in loss of participation credit. Failure to participate in the specified activities can result in a maximum loss of credit of 30 days for each failure to participate. However, those confined for other than behavior problems shall be given specified activities commensurate with the custodial status.

(d) This section shall not apply to any person whose crime was committed on or after January 1, 1983.

Cal. Penal Code § 2932. Denial of time credits; grounds; limitations; procedure; effect; review; criminal prosecution

a) For any time credit accumulated pursuant to Section 2931 or to Section 2933, not more than 180 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a felony whether or not prosecution is undertaken, except that not more than one year of credit may be denied or lost for a single act of battery in which great bodily injury is inflicted upon a nonprisoner. Not more than 90 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as as misdemeanor, whether or not prosecution is undertaken. Not more than 30 days of credit may be denied or lost for a single act of misconduct defined by regulation as a serious disciplinary offense by the Department of Corrections. Any person confined due to a change in custodial classification following the commission of any serious disciplinary infraction shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days of credit which have been lost for such act of misconduct. In unusual cases, an inmate may be denied the opportunity to participate in a credit qualifying assignment for up to six months beyond the period specified in this subdivision if the Director of Corrections finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a substantial risk of physical harm to staff or other inmates. At the end of the six-month period and of successive six-month periods, the denial of the opportunity to participate in a credit qualifying assignment may be renewed upon a hearing and finding by the director.

The prisoner may appeal the decision through the department's review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the situation.

(b) For any credit accumulated pursuant to Section 2931, not more than 30 days of participation credit may be denied or lost for a single failure or refusal to participate. Any act of misconduct described by the Department of Corrections as a serious disciplinary infraction if committed while participating in work, educational, vocational, therapeutic or other prison activity shall be deemed a failure to participate.

(c) Any procedure not provided for by this section, but necessary to carry out the purposes of this section, shall be those procedures provided for by the Department of Corrections for serious disciplinary infractions if those procedures are not in conflict with this section.

(1) The Department of Corrections shall, using reasonable diligence to investigate, provide written notice to the prison. The written notice shall be

given within 15 days after the discovery of information leading to charges that may result in a possible denial of credit, except that if the prisoner has escaped, the notice shall be given with 15 days of the prisoner's return to the custody of the Director of Corrections. The written notice shall exclude the specific charge, the date, the time, the place, the evidence relied upon, a written explanation of the procedures that will be employed at the proceedings and the prisoner's rights at the hearing. The hearing shall be conducted by an individual who shall be independent of the case and shall take place within 30 days of the written notice.

(2) The prisoner may elect to be assigned an employee to assist in the investigation, preparation, or presentation of a defense at the

disciplinary hearing if it is determined by the department that: (i) the prisoner is illiterate; or (ii) the complexity of the issues or the prisoner's confinement status makes it unlikely that the prisoner can collect and present the evidence necessary for an adequate comprehension of the case.

(3) The prisoner may request witnesses to attend the hearing and they shall be called unless the person conducting the hearing has specific reasons to deny this request. Such specific reasons shall be set forth in writing and a copy of the document shall be presented to the prisoner.

(4) The prisoner has the right, under the direction of the person conducting the hearing, to question all witnesses.

(5) At the conclusion of the hearing the charge shall be dismissed if the

facts do not support the charge, or the prisoner may be found guilty on the basis of a preponderance of the evidence.

(d) If found guilty the prisoner shall be advised in writing of the guilty finding and the specific evidence relied upon to reach this conclusion and the amount of time-credit loss. The prisoner may appeal such decision through the Department of Corrections' review procedure, and may, upon final notification of appeal denial, within 15 days of such notification demand review of the department's denial of credit to the Board of Prison Terms, and the board may affirm, reverse, or modify the department's decision or grant a hearing before the board at which hearing the prisoner will have the rights specified in Section 3041.5.

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(e) Each prisoner subject to Section 2931 shall be notified of the total amount of good behavior and participation credit which may be credited pursuant to Section 2931, and his anticipated time-credit release date. The prisoner shall be notified of any change in the anticipated release date due to denial or loss of credits, award of work time credit, under Section 2933, or the restoration of any credits previously forfeited.

(f) If the conduct the prisoner is charged with also constitutes a crime, the Department of Corrections may refer the case to criminal authorities for possible prosecution. The department shall notify the prisoner, who may request postponement of the disciplinary proceedings pending such referral.

The prisoner may revoke his request postponement of the disciplinary proceedings up until the filing of the accusatory pleading. In the event of the revocation of the request for postponement of the proceeding, the department shall hold the hearing within 30 days of the revocation.

In the case where the prisoner is prosecuted by the district attorney, the Department of Corrections shall not deny time credit where the prisoner is found not guilty, in which case the procedures in subdivision (c) shall not apply.

(g) If time credit denial proceedings or criminal prosecution prohibit the release of a prisoner who would have otherwise been released, and the prisoner is found not guilty of the alleged misconduct, the amount of time spent incarcerated, in excess of what the period of incarceration would have been absent the alleged misbehavior shall be deducted from the prisoner's parole period.

(h) Nothing in the amendments to this section made at the 1981-82 Regular Session of the Legislature shall affect the granting or revocation of credits attributable to that portion of the prisoner's sentence served prior to January 1, 1983.

Cal. Penal Code § 2933. Worktime credits on sentences; amount; receipt; forfeiture; restoration; review

(a) It is the intent of the Legislature that persons convicted of crime and sentenced to state prison, under Section 1170, serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections. Worktime credits shall apply for performance in elementary, high school, or vocational educational programs. Enrollment in a two- or four-year college program leading to a degree shall result in the application of time credits equal to that provided in Section 2931. For every six months of full-time performance in a credit qualifying program, as designated by the director, a prisoner shall be awarded worktime credit reductions from his term of confinement of six months. A lesser amount of credit based on this ratio shall be awarded for any lesser period of continuous performance. Less than maximum credit shall be awarded pursuant to regulations adopted by the director for prisoners not assigned to a full-time credit qualifying program. Every prisoner who refuses to accept a full-time credit qualifying assignment or who is denied the opportunity to earn worktime credits pursuant to subdivision (a) of Section 2932 shall be awarded no worktime credit reduction. Every prisoner who voluntarily accepts a half-time credit qualifying assignment in lieu of a full-time assignment shall be awarded worktime credit reductions from his term of confinement of three months for each six-month period of continued performance. Except as provided in subdivision (a) of Section 2932, every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to a full-time assignment or is assigned to a program for less that full time, shall receive no less credit than is provided under Section 2931. Under no circumstances shall any prisoner receive more than six months' credit reduction for any six-month period under this section.

(b) Worktime credit is a privilege, not a right. Worktime credit must be earned and may be forfeited pursuant to the provisions of Section 2932. Except as provided in subdivision (a) of Section 2932, every prisoner shall have a reasonable opportunity to participate in a full-time credit qualifying assignment in a manner consistent with institutional security and available resources.

(c) Under regulations adopted by the Department of Corrections, which shall require a period of not more than one year free of disciplinary infractions, worktime credit which has been previously forfeited may be restored by the director. The regulations shall provide for separate classifications of serious disciplinary infractions as they relate to restoration of credits; the time period required before forfeited credits or a portion thereof may be restored; and the percentage of forfeited credits that may be restored for such time periods. No credits may be restored if they were forfeited for a serious disciplinary infraction in which the victim died or was permanently disabled. Upon application of the prisoner and following completion of the required time period free of disciplinary offenses, forfeited credits eligible for restoration under the regulations shall be restored unless, at a hearing, it is found that the prisoner refused to accept or failed to perform in a credit qualifying assignment or extraordinary circumstances are present that require that credits not be restored. "Extraordinary circumstances" shall be defined in the regulations adopted by the director.

The prisoner may appeal the finding through the Department of Corrections review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the institution.

(d) The provisions of subdivision (c) shall also apply in cases of credit forfeited under Section 2931 for offenses and serious disciplinary infractions occurring on or after January 1, 1983.

15 Cal.Admin.Code § 3335. Administrative Segregation.

(a) When an inmate's presence within an institution's general inmate population presents an immediate threat to the inmate's own safety, the safety of others, endangers institution security or jeopardizes the integrity of an investigation into alleged serious misconduct or criminal activities, the inmate will be immediately removed from general population and be placed in administrative segregation. Administrative segregation may be accomplished by confinement in a unit designated for that particular purpose or, in an emergency, to any single cell unit capable of providing segregation from the general population and the degree of security and control required of the reason for such placement.

(b) An inmate's removal from general population and placement in a segregated unit for any reason except as provided in Section 3340 will be considered as administrative segregation until such time as a disciplinary or classification hearing has been held on the reasons or need for separation from the general population and other housing is designated.

15 Cal.Admin.Code § 3336. Segregation Order.

Authority to order an inmate to be placed in administrative segregation, before such action is considered and ordered by a classification hearing, may not be delegated below the staff level of correctional lieutenant or correctional program supervisor III, except when a lower level staff member is the highest ranking official on duty.

(a) The reason for ordering an inmate's placement in administrative segregation will be clearly documented on a CDC Form 114-D (Order and Hearing on Segregated Housing) by the official ordering the action at the time the action is taken.

APPENDIX

(b) In addition to explaining the reason and need for an inmate's placement in administrative segregation, the official ordering the action will determine if a staff member needs to be assigned to assist the inmate in presenting the inmate's position at a classification hearing on the need for retention in segregated housing. Staff assistance will be assigned and the assignment will be noted on the CDC Form 114-D if the inmate can collect and present evidence necessary for an adequate comprehension of the inmate's position at a classification hearing. If an inmate is not illiterate and the issues are not complex, staff assistance will not be assigned. The reason for not assigning staff assistance will be entered on the CDC Form 114-D.

(c) In assigning staff assistance, the official initiating the CDC Form 114-D will designate the inmate's caseworker by name, as the staff member to assist the inmate. If the assigned caseworker's name is not known or cannot be readily determined by the official initiating the CDC Form 114-D, the words "assigned caseworker" will be entered on the form.

(d) A copy of the CDC Form 114-D with the "order" portion of the form completed, will if practical, be given to the inmate prior to placement in administrative segregation but not later than 48 hours after such placement. Copies of the CDC Form 114-D with the "order" portion completed will also be submitted to the warden or superintendent or designated staff for review and possible further action as described in section 3337. A copy of the CDC Form

114-D will also be routed to the records office as a notice of the inmate's current status and pending actions.

15 Cal.Admin.Code § 3339. Release From Administrative Segregation and Retention in Administrative Segregation.

(a) Release: Release from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate's initial placement in administrative segregation. Nothing in this article shall prevent the official ordering an inmate's placement in administrative segregation, or a staff member of higher rank in the same chain of command, from withdrawing an administrative segregation order before it is acted upon or prior to a hearing on the order after consulting with and obtaining the concurrence of the administrator of the general population unit to which the inmate will be returned or assigned. Release from segregated housing after such placement shall be effected only upon the written order of an equal or higher authority.

. . . .

[October 18, 1984]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Joseph TOUSSAINT, et al., Plaintiffs/Appellees/ Cross-Appellants, v. Daniel McCARTHY, et al., Defendants/Appellants/ Cross-Appellees.	No. C-73-1422 SAW

WEIGEL, Senior District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

The following Findings of Fact and Conclusions of Law underlie the Court's decision on the merits of a class action challenging the legality of conditions of confinement for prisoners held in administrative segregation--hereafter referred to as "segregation"--in the California State Prison at San Quentin

("San Quentin") and the California State Prison at Folsom ("Folsom").[1] The lengthy history of the litigation was recounted in some detail in connection with the preliminary injunction entered in this case on January 14, 1983, see Toussaint v. Rushen, 553 F.Supp. 1365 1367-69 (N.D.Cal. 1983) vacated in part, 722 F.2d 1490 (9th Cir. 1984) and need not be repeated here. The preliminary injunction was affirmed by the Ninth Circuit on January 5, 1984, except for one portion dealing with food service, which was vacated because unsupported by specific findings. Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984).

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[1] Plaintiffs are a class, certified February 25, 1976, comprising all prisoners confined in or subject to confinement in administrative segregation in four California state prisons--in addition to San Quentin and Folsom, Deuel Vocational Institute at Tracy ("DVI-Tracy"), and the Correctional Training Facility at Soledad ("Soledad"). See Toussaint v. Rushen, 553 F.Supp. 1365, 1367 & n. 1 (N.D.Cal.1983)(defining term "administrative segregation"). Defendants are the Director of the California Department of Corrections and the wardens and superintendents of the above-listed institutions. This decision applies only to conditions at San Quentin and Folsom, which were the subject of a trial before the Court beginning November 7, 1983, and ending January 11, 1984. The second phase of trial, pertaining to conditions at DVI-Tracy and Soledad, is presently scheduled to commence in November, 1984. Segregated units at these two prisons will continue to be subject to the preliminary injunction entered January 14, 1983.

The first phase of trial on the merits commenced in this Court on November 7, 1983. It was limited to conditions at the San Quentin and Folsom prisons largely because of representations made by defendants that segregation at Soledad and Tracy would soon be discontinued. Trial lasted nearly two months. More than 65 witnesses testified. There are well over

1000 trial exhibits. The transcript is 4643 pages long. In addition, the Court, accompanied by counsel for both sides, inspected the premises at San Quentin.

The findings and conclusions which follow are based upon the Court's independent review of all the evidence as well as upon consideration of the findings and conclusions proposed by both sides. As detailed below, the Court finds and concludes that conditions of confinement for segregated inmates at San Quentin and Folsom violate the Eighth and Fourteenth Amendments to the United States Constitution and that relief previously ordered in this case to correct constitutional violations has not been fully effective.[2] The Court accordingly renders a Judgment of Permanent Injunction ordering termination of the unlawful conduct of defendants and providing for the appointment of a Special Master to monitor compliance.

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[2] See Wright v. Enomoto, 462 F.Supp.
(Footnote Continued)

[1] The Eighth Amendment to the Constitution prohibits the infliction of "cruel and unusual punishments." The ultimate question in this case is whether the defendants, officials of the State of California, have violated this prohibition by confining prisoners under the conditions that obtain in segregation units at San Quentin and Folsom. To answer this question is difficult, because no static "test" can be formulated to determine whether

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(Footnote Continued)

397, 399, 404 (N.D.Cal. 1976), aff'd, 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978); Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983).

conditions of confinement are "cruel and unusual." Rhodes v. Chapman, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981). Rather, the meaning of the Eighth Amendment prohibition is to be drawn "from the evolving standards of decency that mark the progress of a maturing society." Id.; Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (Plurality opinion). Ordinarily, the Court's judgment as to the nature of these standards should be governed to the maximum possible extent by objective indicia of what the general public would consider decent.[3/] See

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[3/] Such indicia include, for example, history, the provisions of law enacted by state legislature, expert opinions and professional standards. See, e.g., Rhodes, 452 U.S. at 346-47, 101 S.Ct. at 2399-2400; Estelle v. Gamble, 429 U.S. 97, 103-04 & n. 8, 97 S.Ct. 285, 290-91,
(Footnote Continued)

Rhodes, 452 U.S. at 346, 101 S.Ct. at 2399; Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). But public perceptions are not alone conclusive. In the cogent words of Chief Justice Warren, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop, 356 U.S. at 100, 78 S.Ct. at 597; see Gregg v. Georgia, 428 U.S. 153, 178, 96 S.Ct. 2909, 2927, 49 L.Ed.2d 859 (1976) (plurality opinion).

[2] In the context of cases challenging prison conditions, courts in this circuit and others have commented that "[a]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with

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(Footnote Continued)

& n. 8, 50 L.Ed.2d 251 (1976); Toussaint v. Yockey, 722 F.2d at 1495.

adequate food, clothing, shelter, sanitation, medical care and personal safety." Hoptowit, 682 F.2d at 1246; Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981); Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978), rev'd on other grounds, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); see also Newman v. State of Alabama, 559 F.2d 283, 286 (5th Cir. 1977), rev'd in part on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). Of course, this enumeration is not necessarily exhaustive. For example, it is settled that prisoners may not be deprived of all exercise, because "some form of regular outdoor exercise is extremely important to the psychological and physical well-being of the inmates." Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979)(citing cases); Ruiz v.

Estelle 679 F.2d 1115, 1152 & n. 173 (5th Cir. 1982), *cert*. *denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); *Martino v. Carey*, 563 F.Supp. 984, 1001 (D.Ore. 1983). The task before the Court is to examine each specific challenged condition of confinement and to determine whether that condition, in the context of the overall prison environment, comports with human decency. *Wright v. Rushen*, 642 F.2d at 1133. If found indecent, the condition must be remedied. However, the relief granted must be only so much as is required to correct the specific deficiency. *Hoptowit*, 682 F.2d at 1247; *Wright*, 642 F.2d at 1134.

II. FINDINGS OF FACT

1. San Quentin and Folsom are among the oldest penal institutions still in use in the United States today. San

Quentin first opened in 1853; Folsom in 1880. The buildings presently used to house the majority of segregated inmates are relatively old and outmoded five-tier cell blocks constructed between 1910 and 1934.[4/] Segregated inmates are also housed in two more modern buildings, SHU I at Folsom and the "Adjustment Center" at San Quentin. The latter was built in 1959 and 1960.

2. The class of plaintiffs in this action is defined principally by reference to the percentage of each day that they are required to spend in their

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[4/] As of April 6, 1982, at least 1000 segregated inmates were housed in five-tier cell blocks at San Quentin. See Exhibit 56. About 64 were housed in another unit, the Adjustment Center. Likewise, at Folsom the great majority of segregated inmates are housed in the five-tier SHU II.

cells.[5] The term "segregated inmate" means, at bottom, one who is not permitted to mingle with the general prison population. To accomplish segregation, prison officials at San Quentin and Folsom lock inmates in their cells on a round-the-clock basis. Under this system, segregated inmates are allowed out of their cells only for essential activities such as showers, exercise, visits, medical treatment and classification hearings. During all such excursions, segregated inmates are made to wear handcuff restraints except when they are actually showering, exercising or contact visiting. In the record and in these findings, this form of confinement is referred interchangeably as "segregation" or "lockup."

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[5] The official definition of plaintiffs' class is set forth in the Order Determining that Action is Maintainable as a Class Action, enter February 25, 1976. Plaintiffs include all inmates housed in "any of the maximum security, minimum privilege, segregated housing units in San Quentin Prison, Folsom Prison, the Correctional Training Facility ('Soledad'), and the Deuel Vocational Institute ('DVI')." The most significant aspect of this definition is the term "segregated housing." The meaning of this concept is discussed in text below.

3. According to a former warden, approximately 2100 inmates are typically held in segregated confinement at San Quentin at any one time. Upwards of 500 are so held at Folsom. Credible testimony presented at trial disclosed that the concentrated confinement of such large numbers of segregated inmates is extremely rare, if not unprecedented, in the history of American corrections.

4. The reasons why inmates are assigned segregated status at San Quentin and Folsom vary. Formally, they may be

placed in three categories. First, inmates are segregated as punishment for disciplinary rule infractions. This sort or lockup is commonly referred to as "segregated housing" or "SHU". Second, inmates are segregated because of an institutional perception that they pose a threat to the safety of other inmates or staff, or to the security of the institution. This type of lockup is sometimes called "management control." Third, inmates are segregated because of a perception that the inmates themselves may be harmed by other inmates if they must mingle in the general population. This variety of lockup is sometimes called "protective housing.",

5. In addition, there is a fourth term used to describe a form of segregated status: "Administrative segregation." Although sometimes used as a catch-all to

refer to lockup generally, "administrative segregation" technically refers only to a temporary status to which an inmate is assigned for a period of up to 30 days pending a determination of whether he should be assigned more permanent "segregated" status for one of the three reasons listed above. Evidence at trial showed that many or most prisoners newly arriving at San Quentin or Folsom are initially placed in "administrative segregation" for a period of "orientation."

6. Present policies of the California Department of Corrections call for the housing at San Quentin and Folsom of "Level IV" inmates. These are inmates classified as requiring the highest level of security in custody, based on their precommitment history, commitment offense, term of imprisonment, and other

case factors.[6] Most have had, in essence, a life of crime, sometimes going back to age six or seven. San Quentin is particularly notorious for its "irascible population" and "aura of brutality." In a report prepared by the Board of Governors of the State Bar of California, received in evidence, San Quentin was characterized as California's "Devil's Island." The inmate population at Folsom is not materially different. As many of the plaintiffs in this case are among the most anti-social and violent of the inmates held in the two prisons, they pose formidable behavior problems for correctional staff.

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[6] See generally 15 Ca.Admin.Code § 3375(b) (1981).

Following are the court's findings concerning each condition of confinement challenged by plaintiffs.

A. Segregation Cells

7. The cells in which plaintiffs are presently housed at San Quentin are located in four buildings: The Adjustment Center (SHU), South Block (SHU "B" or "Badger," "C" or "Carson," and "D" or "Donner" Sections), East Block (MCU) and North Block (MCU). At Folsom, plaintiffs are housed in two buildings, referred to herein as "SHU I" (Building 4) and "SHU II" (Building 1, Sections B and C).

8. South Block, East Block, and North Block at San Quentin, and SHU II at Folsom , are five-tier cell blocks. That is, they contain five rows, or "tiers," of cells stacked vertically atop one

another. Outside the barred fronts of the cells runs a walkway, approximately 20 to 30 feet of open space extends unbroken from the bottom of the first tier to above the top of the fifth tier. On the wall behind the open space, opposite the cell fronts, other walking platforms called "gunwalks" are mounted. This wall also contains windows. For most of the cells in these cell blocks, the windows across the open space and behind the gunwalks are the sole source of natural light.

9. The Adjustment Center at San Quentin and SHU I at Folsom are more modern in design. The cells are arranged in separate floors, with their fronts facing on enclosed corridors.

10. The cells used to house segregated inmates in all of these units are basically similar. All are between five

and six feet in width, and between eight and ten feet in length. The smallest is 45.5 square feet (Folsom SHU I), while the largest is 56 square feet (San Quentin Adjustment Center). Most lockup prisoners are housed in cells measuring 48 (San Quentin five-tier cell blocks) or 49.5 (Folsom SHU II) square feet. These cells are generally furnished with one or two bunks beds, a coverless toilet, a sink, a shelf, and a small mirror. The fronts of the cells are open, except for bars. The remaining walls, ceiling and floor are solid and windowless. The cells also have a light, sometimes mounted on the ceiling and sometimes on the back wall. Most, if not all, contain one double electrical outlet.

11. A small number of these cells have, in addition, a solid outside door with only a small window or no window.

Since the door admits virtually no natural light, and the electric light is controlled from the outside, these cells can be made completely dark indefinitely at the discretion of correctional authorities. So used, they are called "quiet cells." Although the use of quiet cells is not officially permitted, evidence at trial established that prisoners are in fact confined in such cells during the day-time with the solid door closed and the light turned off form the outside.

12. Plaintiffs are restricted to their cells at all times, except when there is some specific reason for permitting them to be elsewhere. Plaintiffs are thus required to perform all functions of eating, sleeping, and elimination within the cells. Not uncommonly, a segregated inmates may languish five or more

consecutive days locked inside his cell, never once setting foot outside the cell.

B. Double-Celling

13. Until recently, some lockup inmates at both San Quentin and Folsom were involuntarily double-celled.[7] Because only about eighteen inches separate the bunks from the opposite wall, one of the two inmates must remain on his bunk at all times if the other is to move freely about the cell. The distance between the surface of the top bunk and the ceiling is insufficient to

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[7] As a result of the preliminary injunction entered by this Court on January 14, 1983, there is now no double-celling in segregated units of either prison. However, the record contains ample evidence, including the testimony of inmates formerly double-celled in lockup, to enable the Court to make findings concerning the character and effects of the practice.

permit a man to sit upright on that bunk. Confining two inmates together in a cell of the dimensions here involved, under the conditions prevailing in lockup at San Quentin and Folsom, deprives each of any semblance of privacy, since neither is permitted to leave the cell. Such confinement, in the midst of the other abhorrent conditions detailed below, engenders tension and psychiatric problems. Still worse, it inevitably engenders violence, particularly violence between cellmates. The stronger of the inmates generally establishes psychological, physical, and often sexual dominance over the other.

14. The overwhelming majority of witnesses for both sides at trial sharply criticized the practice of double-celling under conditions prevailing in lockup at San Quentin and Folsom. Two witnesses

who have been defendants in this case (former California Director of Corrections Ruth Rushen and former San Quentin Warden George Sumner) stated that such double-celling is "inhuman." The Court so finds.

C. Heating and Ventilation

15. In the San Quentin Adjustment Center and Folsom SHU I, the heat in cells used to house segregated inmates is adequate. In the remaining buildings, use to house most plaintiffs, it is not. At San Quentin, each five-tier cell block is supposed to be heated by an internal gas heater and ventilating system. Frequently these systems do not work, even in the winter. The chill resulting from lack of heat is compounded by numerous broken windows, which admit cold

air and moisture.[8] Moisture also enters the units through leaky roofs and overflowing sinks, toilets, and showers. The result has been aptly described as a "chilly mist" that dampens everything in the cell blocks, particularly at night. Conditions in SHU II at Folsom are similar. Consequently segregated inmates at both prisons complaint of "freezing." To combat the chill, many wear all their clothing at all times, even while sleeping. Many also huddle under blankets for warmth, even during the day. One inmate testified that to combat what he called the "miserable cold" inside Folsom SHU II during the winter of 1982-83, he usually lay fully dressed beneath two blankets with a layer of newspaper in between. Lockup inmate also frequently cover their cell bars with cardboard or paper in an effort to keep out the cold breezes that sweep through the units. Recognizing the existence of drafts, prison guards commonly permit this practice, although it is officially prohibited for reasons of security and fire safety.

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[8] In response to this Court's preliminary injunction, some efforts have been undertaken to prevent and repair broken windows at both prisons. Again, the record contains ample evidence to support a finding that in the absense of court order, large number of broken windows have been left unrepaired by prison officials for lengthy periods. Moreover, some windows have not been repaired promptly even since entry of the injunction.

Many of the broken windows are caused by inmate misbehavior. Some are caused by gunfire in the units.

16. Most lockup buildings lack functional ventilation systems. An expert who conducted tests in all lockup units found no measurable air movement in any except the East Block MCU at San

Quentin. [9] A putrid odor lingers about the units. This odor is caused by the bodily functions of inmates, eating, sleeping and eliminating under crowded conditions in the same immediate area. In addition to giving rise to a foul living environment, the lack of adequate ventilation foster the spread of communicable disease among the inmates, and particularly among double-celled inmates. During the summer, some of the cell blocks become exceedingly warm, particularly the upper tiers.

9/ Defendants did not introduce any test results to contradict or dispute this data.

D. Plumbing

17. Evidence at trial established that the plumbing and sewage disposal systems in lockup units at both prisons are antiquated, deteriorated, and in need of replacement. These systems have simply broken down from years of very heavy use without adequate preventive maintenance. Sewage pipes at San Quentin are rotten and frequently clog, causing raw sewage to back up into the lockup units. This, of course, intensifies the foul odor and disease hazards in the units. So too does the fact that sewer caps are missing, allowing methane, a nauseating and potentially explosive gas, to escape into prison buildings. The sewer system at Folsom also suffers from "major" problems, according to the Chief of Plant Operations at the prison. The plumbing system at both prisons exhibits symptoms

of serious age deterioration, including corrosion and leakage.[10]

18. In-cell plumbing is hardly better. Leaks are prevalent in both cell toilets and sinks. The leaking water flows onto the floors of the tiny cell cubicles, further exacerbating the damp, cold conditions that frequently obtain. Often these leaks are not repaired for long periods. Toilet and sink drains malfunction and clog on frequent occasions.[11] Sometimes, but not always,

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[10] Cross-connections between the fresh water and waste water systems are not fitted with vacuum breakers, creating a risk that waste water could contaminate the fresh water supply.

[11] In addition to problems of malfunction, the evidence shows that the plumbing fixtures can also cause problems by breaking. One inmate testified that he suffered extensive cuts requiring hospitalization when his toilet broke while he was sitting on it. When
(Footnote Continued)

these problems are caused by the misbehavior of inmates who occupy the cells and who flush improper items.

19. Behind the back walls of the cells in each unit, to which the sinks and toilets are connected, runs a service area or "pipe chase." the condition of these areas, as demonstrated by uncontradicted evidence, is shocking. Plumbing pipes leak in various places, as do broken sewage mains and steam water lines. An environmental expert identified in the bottom of more than one pipe chase waste material from a sewer cleanout, including human feces, and rotting garbage. the filth in these service areas adds to the general stench

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(Footnote Continued)

assigned to another cell following his return from the hospital, he immediately tested the toilet. It also broke.

in the immediate adjacent cell area. It provides an ideal medium in which the cockroaches and rats that infest both prisons spawn and thrive. These appalling conditions, in close proximity to the living area, pose a substantial hazard to the health of segregated inmates.

20. Another serious health hazard recurrent in the five-tier units is standing water. Stagnant pools are common in the showers, where drains are often clogged. Puddles also accumulate from time to time in the bottoms of the cellblocks, which are not always equipped for adequate drainage. Cells occasionally flood as a result. These

pools foster vermin, including mosquitoes, and mildew. [12]

E. Lighting

21. As described above, cells in the five-tier units admit little natural light. The only source of such light is the wall across from the fronts of the cells. The cells are but dimly lit inside. Generally they are equipped with one bare light bulb. [13] This produces a

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[12] Standing water also causes operational problems. An inmate testified that his San Quentin East Block tier was left without heat when a tier officer was unable to switch on the heating system due to three feet of water standing in the basement.

[13] Robert Dacy, a former Folsom SHU II lockup inmate, testified that his cell was equipped with a 40 or 60 watt bulb. Defendants presented no evidence to suggest that other cells differ. A report introduced by plaintiffs as Exhibit 56 states that cells are
(Footnote Continued)

maximum cell illumination of between 7 and 15 foot-candles. Illumination of 20 foot-candles is deemed an "essential" standard for the housing of inmates by the American Correctional Association (ACA). The Society of Illuminating Engineers considers 30 foot-candles the minimum required for reading and writing without headaches or eyestrain. The uncontradicted evidence establishes that the great majority of inmates in all lockup units at both prisons lack sufficient light in their cells to read comfortably while seated or lying on their bunks. [14]

(Footnote Continued)

generally equiped with a 75 or 100 watt bulb at San Quentin.

[14] Some inmates use homemade shades made of materials such as cardboard to dim their lights. They do this from a desire to obtain privacy or to sleep.

F. Noise

22. The unrelenting, nerve-racking din that fills the segregation units was roundly condemned by every witness who addressed the subject. The constant racket, while a problem in all units, is worst in the five-tier cell blocks at San Quentin. Next worst is Folsom SHU II, which is slightly quieter due to a prison rule requiring the use of earphones with televisions, radios and stereos. Hardly quiet, but more tolerable, are the two more modern facilities, the Adjustment Center at San Quentin and SHU II at Folsom. These buildings are less noisy because they are divided into separate floors. In the cell blocks, consisting of five stories of acoustically unitary space, sound reverberates freely, magnifying noises of all kinds. The cell

blocks are devoid of any sound absorbing material.

23. The sources of bedlam are as varied as the activities performed within the units. Radios and televisions blare. Gates clang open and shut. Inmates, held under conditions of "isolation" in which they cannot see each other, shout at the top of their voices in attempts to communicate with their fellows. As acoustics expert scientifically measured sound levels prevailing in San Quentin B Section cell and found that the typical average daytime sound level is in the range of 70 to 75dBa, a level he likened to a noisy vacuum cleaner or a freight train at a distance of about 100 feet. The expert further stated that while conducting these tests, he was at times unable to make himself understood, even by shouting, with a guard standing only

about 15 feet away. After midnight, dBa levels drop, reaching an average low in the range of 60 dBa between 5 and 6 o'clock a.m. This compares with a noisy office.[15]

24. The unceasing racket exerts a profound impact on lockup inmates, some of whom consider it to be the single worst aspect of their confinement. Many shove paper, erasers, and other foreign objects into their ears in an attempt to shut it out. Noise contributes to the great difficulty many experience in sleeping. Doctors at both prisons

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15/ The maximum noise levels permitted by ACA standards are 70 dBa in the daytime and 45 dBa at night. It should be noted in this regard that the uncontradicted test results showed, in addition to the average levels mentioned in the text, peaks as high as the mid to upper 80's during the day the low 70's at night.

testified that the "relentless" roar adversely affects the mental health of segregated inmates. The noise dulls the thinking of the prisoners and even damages the hearing of some.

G. Electrical Systems

25. The electric wiring in both prisons is antiquated, and would not meet the most general of building codes. In the cell blocks, wiring had been altered to enable inmates to use multiple appliances within their cells. the result has been characterized as an "electrical nightmare." Connection boxes are not covered, many connections are made in open space, and bare wires are visible. In many cells, outlets dangle by exposed wires. Electric wires are also exposed in showers at San Quentin. San Quentin lockup inmates lacking

running hot water in the cells employ "stingers," electric coil devices, to heat water. All of these conditions entail serious dangers of electrocution. In addition, the power system in lockup units at each prison are overloaded. Outages are common.

26. The many exposed wires create a severe fire hazard. The danger is particularly acute in the "pipe chase" service areas, where wires can become wet due to leaky plumbing. The service areas display visible evidence of fires. Inmates also suffer burns because very often their cells have no functioning switches and they must turn out the light by unscrewing the bulb by hand. The electrical systems in lockup units of each prison need complete remodeling.

H. Fire Safety

27. Fire hazards abound in lockup units at both prisons. These include the electric wiring, described above, the cell bar coverings, described above, and the many flammable materials stored inside inmate cells. Minor fires are relatively frequent occurrences within lockup units, largely because inmates employ "burning" as a technique for protest or just to get attention. Arson directed at specific inmates is a cause of fire as well. Despite the concrete and steel composition of the cell block structures, tests show that fires can rage extremely hot, reaching temperatures exceeding 2000° Fahrenheit.

28. In the light of these hazards, fire preparedness at both prisons is very poor. Many essential firefighting

resources are lacking.[16/] None of the lockup units has a sprinkler system. Only the San Quentin Adjustment Center has smoke detectors. The ventilation systems are inadequate to remove the smoke that accumulates in the upper tiers of cell blocks during even minor fires. Lockup inmates receive no instructions for procedures to be followed in the event of a serious fire, nor do they participate in fire drills. Evacuation would quickly become difficult or impossible during such a fire due to physical conditions. Many inmates would have to travel substantial distances to reach fire exists [sic]. Cell bars would swell with heat, making the doors

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[16/] These include self-contained breathing apparatus (Folsom) and built-in firepipe stands (San Quentin).

difficult or impossible to open without the so-called "Jaws of Life" apparatus. Certain keys needed to open some cells are not kept in the units at all times, and the necessity of retrieving them could occasion further delay.

29. All of these factors create a substantial risk that a major fire will break out in one of the segregated units, killing tens or hundreds of inmates. Such a tragedy has yet to occur, though there has been at least one fatal fire in lockup during the pendency of this action. At San Quentin on May 30, 1981, two inmates died of smoke inhalation. In that instance, the metal in the cell door expanded and the door when unlocked could not be opened.

I. Earthquake Safety

30. San Quentin is located in an earthquake-prone geographic zone. Structural deficiencies amounting to seismic hazards have been identified in two San Quentin buildings used to house segregated inmates: East Block and South Block. South Block is particularly suspect due to renovations that have added features of low structural integrity such as free-standing concrete partitions.

J. Clothing, Laundry and Bedding

31. California state-authorized prison inmate clothing falls into two categories: "whites" (underwear, socks and towels) and "blues" (shirts and jeans). Present prison policy calls for lockup inmates to receive on exchange of

both types every week.[17/] In practice, laundry exchange is often not accomplished weekly.[18/] Delays in laundry exchange are particularly troublesome at San Quentin, where inmates complain of having gone for as long as five months without a change of blues, and for weeks without a change of whites. Such delays have been caused by boiler failures, and by "lockdowns" of the general prison population, which deprive the laundry of its work force. When clothes are exchanged, inmates sometimes receive items that are torn, that have broken zippers, or that do not fit.

[17/] Inmates also receive a prison-issue blue denim jacket that is apparently not subject to exchange for laundering.

[18/] A standard "essential" for ACA accreditation of a prison is that inmates must receive an exchange of clothing at
(Footnote Continued)

32. Plaintiffs are commonly assigned to cells furnished with mattresses that are dirty and foul-smelling, stained with water, urine, mildew and food. Mattresses in this condition are not subject to exchange. Some are infested with bedbugs. Almost all are "flat" as a result of long use. Lock-up cells commonly lack pillows, and pillows that are present are frequently in poor condition, tattered and leaking. Blankets issued to lockup inmates are often filthy and torn.

K. Personal Hygiene

33. Segregated inmates at both prisons are denied routine access to the most fundamental requirements for sound

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(Footnote Continued)

least three times weekly and a clean towel daily.

personal hygiene: showers and hot running water. Institutional policy permits segregated prisoners to shower indoors two or three times weekly. In addition, some prisoners have an opportunity to shower outdoors in the course of "exercise."[19] Like laundry exchanges, showers are not always provided as often as they are supposed to be. Lockup inmates have on occasions been locked in their cells without showers for up to three weeks. More commonly, showers are restricted to about one per week due to faulty boilers, a lack of shower space, or a lack of guards for escorting inmates to and from the showers. The Court credits the testimony of former San Quentin Warden Pulley, who stated that the lack of sufficient showers contributes to the overall "inhumane" conditions now prevailing in lockup.

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[19] The adequacy of this opportunity was not established. The record does not, for example, show whether any hot water is available for such showers. The evidence at trial indicates that inmates are not permitted to bring items such as towels with them onto the exercise yards where the outdoor showers are located. Not al San Quentin exercise yards are equipped with showers.

34. The shower facilities themselves are revolting. Many, particularly in five-tier cell blocks, are simply converted cells without ventilation of any kind. Due to accumulated filth and clogged drains, ponds of stagnant water commonly stand on the shower floors. This condition causes inmates to slip and fall, and also fosters the spread of mosquitoes, fungus, mold and mildew, all of which are prevalent. Prior to issuance of this Court's preliminary injunction, inmate tier tenders were not

generally permitted to clean the showers. Since entry of the injunction, sanitation in the showers has improved in some lockup units.

35. No five-tier cell block used to house lockup inmates at San Quentin has hot running water in its cells.[20/] Thus, inmates in these cells may obtain access to hot running water for hygienic purposes as little as one time per week. As one consequence, inmates commonly resort to the use of "stingers" to heat water in their sinks, a practice that is a fire hazard, an electrocution hazard, and a severe power drain on the overloaded electrical systems.

[20/] In-cell "hot and cold running water" is an "essential" ACA standard for prison accreditation.

L. General Sanitation

36. The infrequency of access to hot running water is especially distressing because lockup inmates must spend their days and nights confined in the midst of deplorable filth. All segregated inmates are fed in their cells, but they are given no wastebaskets or other containers in which to store solid refuse. They are expressly instructed to throw all rubbish out onto the tiers or floors in front of their cells, where it is later swept away by inmate tenders. The tiers and floors are not regularly mopped and are encrusted with the remnants of years of deposited waste matter. Garbage can remain for hours on the tiers on floors and also, in the fire-tier units, on the bottom of the cell block, where it accumulates after the tiers are swept. Waste material is removed from the bottom

of the cell blocks by sweeping and hosing, a method grossly deficient by public health standards. Moreover, the gutters become plugged with rotting food and excess paper, allowing water to back up and causing additional bad odors. A correctional counselor employed at San Quentin likened the constant smell in his unit to that in a "recently-used toilet."

37. Lockup cells are also filthy. Contributing factors include the in-cell feeding system, chronic toilet backups as well, often, as the conduct of inmates themselves. However, as to the last, cells are not always cleaned between occupancies and inmates often cannot obtain necessary cleaning materials such as soap and scrub rags or brushes. Even diligent application of such materials cannot remove all of the grime

accumulated on the floors, walls, and bars of the cells.

38. The two smaller, mover modern units are cleaner than the five-tier cell blocks, which may be too large and dilapidated to be returned to a satisfactory state of cleanliness. The total lack of sanitation prevailing in the cell-blocks serves as a constant indecent reminder that the residents are regarded and treated as caged animals, not human beings.

M. Pests

39. Lockup inmates at San Quentin and Folsom are plagued by a variety of pests that thrive upon the accumulated filth. Folsom SHU II tiers are infested with cockroaches and mice. Rats enter the first tier gutters to feed upon the refuse collected there. The San Quentin

cell blocks are infested with all of these, plus flies and mosquitoes.[21] Birds fly in and out of unscreened windows in the segregation cell blocks of both prisons, where they inhabit the tops of the units. All these infestations pose a serious danger to the health of inmates. In the face of this danger, defendants bring in outside contractors in vain attempts to exterminate. Despite strong recommendations from state sanitarians, neither prison has even one full-time employee charged with the task of alleviating the enormous pest problems.

N. Food

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[21] One inmate testified that he was forced to erect a cardboard barrier across the front of his cell to prevent rats from entering.

40. All lockup inmates eat all of their meals in their cells. Meals are prepared in central kitchen facilities used to support prison dining generally. Serious deficiencies in sanitation and active mouse and insect infestations in the San Quentin prison kitchen were documented in the findings and conclusions of the court in Wilson v. Deukmejian, No. 103454, at 10-14, 19 (Cal. Superior Ct. filed Sept. 13, 1983), which concluded that conditions there constitute "a threat to the physical health of the inmates and fall below contemporary standards of decency." From the evidence presented here, this Court agrees. The evidence established a number of noisome practices and conditions in addition to those remarked upon in Wilson: Examples include open and exposed meats in an unclean,

improperly sealed meat cooler and meats stored at substandard temperatures, between 55 and 60 degrees, providing an ideal medium for food-borne disease-producing bacteria.

41. Bad as San Quentin kitchen conditions are, conditions in the kitchen facility at Folsom are, in the words of an expert who inspected both kitchens, "incredibly worse." Among his uncontradicted observations were: (1) an active infestation of rats;[22] (2) an active infestation of both roaches and flies; (3) pools of standing water in the kitchen; (4) inadequate ventilation, resulting in heavy deposits of grease and

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[22] An "infestation" in this context refers to both the presence and the growth and reproduction of a species of organism in a given environment. Mere presence by itself is referred to as "activity."

grime on exposed surfaces, and condensation dripping from those surfaces, potentially into food; (5) exposed electrical wires; (6) unsanitary, unclean food contact surfaces; (7) dried food residues on food preparation equipment; and (8) greasy, slippery floors made of porous rather than impervious materials. The walls are composed of granite, and cannot be adequately cleaned. The expert's testimony was corroborated by that of a highly credible inmate witness, a physician prior to entering prison life. This inmate also testified that while working in the Folsom kitchen, he was sometimes instructed to use cheese or meat in sandwiches even though it was spoiled. He further stated that during several periods lasting two or three days, large numbers of inmates complained to him of symptoms of stomach cramps, diarrhea, and vomiting resembling those characteristic of food poisoning. Prison medical logs do not record any such episodes. However, evidence indicated that such outbreaks would not necessarily be recorded.

42. For in-cell feeding, food is often left uncovered during delivery. This fosters the growth of bacteria. Food often arrives contaminated with foreign objects such as roaches, hair, and, incredibly, bits of plastic from shoes.

43. This case involves no claim that food served to lockup inmates is nutritionally deficient. Nor would such a claim be supported by the evidence. However, the evidence amply demonstrates that the food served to segregated inmates in both prisons is stored, prepared and served under conditions so

unsanitary that the food adversely affects the health of the inmates.

O. Exercise

44. The confinement to which segregated inmates are normally subject, locked inside a cell less than 50 square feet in dimension, allows very little meaningful exercise and is physically debilitating. Prisoners consistently suffer from extreme muscular soreness and weakness. One inmate, held in lockup without exercise for 41 days, credibly testified that when released from custody at the end of that period, he experienced great difficulty in walking the necessary two and one-half blocks to freedom.

45. Most SHU, management control, and protective custody inmates are provided with some minimal opportunity to engage in out-of-cell exercise. "Administrative

segregation" inmates are not. "Exercise," in the case of all plaintiffs, means outdoor exercise, because no indoor facilities are available. If it rains during a scheduled exercise period, the prevailing policy is either to cancel exercise (Folsom) or to afford inmates the option of forgoing exercise (San Quentin). If rain begins while inmates are in the exercise yard, they must still remain there until the end of the scheduled exercise period.[23/] For this reason, on threatening or inclement days inmates bring with them to the yard plastic bags

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[23/] Use of the term "yard" to describe the exercise areas is a euphemism. The areas allocated to lockup inmates are quite small, generally only slightly larger than a half basketball court. They are paved and surrounded by a chain link cage fence. Facilities are minimal.

with a slit in the top, locally known as "San Quentin raincoats." Though officially considered contraband, this makeshift apparel is the only rain gear available to lockup inmates, and appears generally to be permitted by the guards.

46. In the preliminary injunction, the Court ordered that

> [u]nless precluded by temporary and compelling exigencies, each prisoner shall be provided with outdoor exercise at least one (1) hour every day or two (2) hours every other day, for a minimum total of eight (8) hours a week, or at least three (3) times a week, for a minimum total of ten (10) hours a week.

Toussaint v. Rushen, 553 F.Supp. at 1385. Defendants admit that a substantial number of segregated inmates do not receive this much exercise.[24] The remainder are accorded at best the bare minimum. None exercise daily. Exercise is commonly curtailed or eliminated during institutional "lockdowns," which may be completely unrelated to the behavior of lockup prisoners. The record shows that some inmates endure periods of weeks or even months with no out-of-cell exercise whatever. For most, exercise is irregular. The exercise accorded is insufficient in the case of most lockup prisoners to offset the severely debilitating effects of continuous confinement in a cramped cell.

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[24] The inmates conceded to be receiving less than the required exercise are those in San Quentin East Block and C and D Sections of South Block.

P. Visitation

47. The visits allowed inmates of California prisons fall into three categories. The first is "non-contact visits." In these, the inmate is shackled and speaks with his visitor by telephone; the inmate and the visitor view each other through a glass or plastic barrier. The second is "contact visits." In these, the inmate and his visitor sit together in a common room. They are permitted to touch each other and, in limited measure, to kiss. The third is "family visits," also referred to as "conjugal visits." In these, the inmate and his visitor (to whom he must be legally related) spend a night or a weekend together in a specially designed

housing facility.[25/] Sexual relations between spouses are permitted.

48. Family visiting and contact visiting are considered by prison authorities to be "privileges" that may be withdrawn. With a few exceptions, plaintiffs as a class have very limited privileges. They are not allowed family visits. Normally they are permitted relatively frequent contact visits; however, SHU inmates in San Quentin South Block may have contact visits only if they are free of serious disciplinary infractions for a substantial period, officially one year. Other South Block SHU inmates and "administrative segregation" inmates commonly receive

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[25/] Evidence indicated that San Quentin is one of very few maximum security prisons in the nation to allow conjugal visiting for any of its inmates.

only non-contact visits. Many inmates and visitors regard non-contact visiting as an unsatisfactory or unpleasant mode of visitation.

49. Physical conditions of visitation are the subject of numerous complaints. At Folsom, weekend, holiday, and evening visitation are not available to lockup inmates because the over-taxed facilities are allocated to general population inmates during these choicer time slots. Visitors often experience lengthy delays and unpleasant searches by prison staff prior to contact visits. Delays are also sometimes caused by a lack of sufficient guards to escort inmates to and from the visiting rooms. Scarcity of facilities sometimes requires contact visits to be involuntarily abbreviated.

50. Visiting is an important penological tool, partly because it

preserves community and family ties and gives inmates something to work for and look forward to following release from incarceration. Incidents of violence in the visiting room are rare, because inmates tend to be on their best behavior. However, the smuggling of contraband, particularly drugs, persists as a problem inherent in contact visits despite the thorough searches performed by correctional officials.

Q. Telephone Service

51. Lockup inmates have no access to telephones except in emergencies. Permitting lockup inmates some such access on a reasonable, monitored basis would pose little institutional security risk.

R. Legal Research Materials

52. Segregated inmates are not allowed inside law libraries at either prison. They may conduct legal research only by means of a "paging" system. To use this system, they must request books two or three at a time from the central libraries. Often such requests are overlooked or responses are delayed. Once obtained, books can be kept for only brief periods. This system greatly prolongs the time required to conduct elementary legal research even for an inmate with some formal legal training. For most, effective legal research under the present paging system is virtually impossible. No qualified legal assistants are available to help lockup inmates.

53. The prison libraries themselves are incomplete and over-taxed. Volumes are missing from most commonly-used sets,

as are recent supplements to codes. Libraries at both prisons lack basic treatises and instructional texts. Demand for books in the existing collection at San Quentin is so great that an unmanageable backlog of hold requests has accumulated. The library director stated that he will be forced henceforth to abolish the system of hold requests. Lockup inmates will instead by required to request desired books continuously until the books happen to be available. Lockup inmates have no way to learn of the return of volumes they seek.

S. Idleness

54. Lockup inmates at San Quentin and Folsom may not participate in organized "programs" such as vocational training, education, or hobbies. Except for a few tier tenders, they may not hold jobs.

Communication with inmates in nearby cells is possible but difficult. Daily activities typically available to an inmate in segregation include watching television (if he has one), listening to radio or stereo, or reading whatever printed materials he can secure and store in his cell.[26/] Lockup inmates typically feel extreme boredom. Some find this boredom to be the worst aspect of life in segregation.

55. The overwhelming weight of testimony, including that of knowledgeable California prison officials, leaves no doubt that the long-term confinement of large numbers of

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[26/] Writing, though theoretically possible, is in practice very difficult because of poor lighting, lack of any adequate writing surface within the cells, noise, etc.

inmates without work or other program is an unsound penological practice. The evidence established that many idle lockup prisoners suffer psychological pain and loneliness. Plaintiffs also established that prolonged idleness adversely affects the mental health of a number of inmates. The absence of program spawns tension and violence; it increases rather than decreases antisocial tendencies among inmates.

T. Health Care at Folsom[27]

56. The medical staff at Folsom consists of five physicians, two psychiatrists and a psychologist. One of

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[27] The constitutionality of health care provided to lockup inmates at Sna Quentin is not at issue in this case. That issue is among those presently pending in Marin v. Rushen, No. C 80-0012 MHP (N.D.Cal.).

the physicians is Dr. R. Grant Jordan, Chief Medical Officer at the prison. Dr. Jordan devotes about one-half of his time to administrative duties, and one-quarter to psychiatric treatment of inmates. At the time of trial, one of the remaining physician positions stood vacant following the incumbent's retirement under a cloud of extremely serious negligence charges. Dr. Jordan characterized the entire medical staff, responsible for the care of approximately 3,500 inmates, as "overtaxed." As a result, virtually all screening of inmate complaints is performed by medical technical assistants, or "MTA's." MTA's conduct sick call in the lockup units daily; a physician passes by the cells only once each week. MTA's administer non-prescription drugs and, generally speaking, determine which inmates may be released from the cells for examination by a physician in the prison infirmary. However, lockup inmates will, if they insist, be taken to see a doctor even if not recommended by an MTA.

57. In comparison with other parts of the prison, the Folsom infirmary is relatively clean. The evidence does not for example, show any vermin infestation. But sanitation is not satisfactory from a medical point of view. For one specific example, the area in the infirmary designed for post-operative care is located next to a utility room with a mop sink. The infirmary surgical suite lacks aseptic ventilation adequate for major surgeries. Inmates requiring major emergency surgery are immediately transported to the University of California, Davis hospital in Sacramento, about one-half hour away. Inmates

requiring major elective surgery must await transfer to the California Medical Facility at Vacaville, or to a hospital specializing in the particular procedure.[28]

A wait of approximately six months is normally required for a transfer of this kind, although urgency of need is monitored. Inmates must also await transfer if they have a medical conditions requiring special diet. The only special diet available at Folsom is one designed for treating ulcers. A

28/ Dr. Jordan defined "elective" surgeries as those needed to remedy conditions that are not life-threatening and do not produce major discomfort. Examples he gave were hernias and gallstones. Dr. Jordan stated that "elective" conditions are sometimes quite serious.

substantial backlog of inmates awaits dental treatment at any given time.

58. Like the medical staff, the psychiatric staff is overburdened. Primary attention is devoted to the treatment of emergency cases, typically acute psychotics. Minimal individual and no group therapy is provided lockup inmates, even though such therapy is frequently among the principal recommendations of sentencing courts and parole boards. A very high percentage of lockup inmates suffer from significant psychiatric problems. Some of these receive no treatment.

59. Dr. Jordan believes, and the Court finds, that the quality of health care at Folsom is less than adequate and could be improved in many ways. Additional staff are needed, including physicians, psychiatrists, nurses, and clerical

workers. The last are needed to replace inmate workers who now have access to the medical records of other inmates, an undesirable practice. Less reliance should be placed on MTA's, and MTA's should have standing orders. Physician and psychiatrist performance would benefit from formal peer review, not presently conducted. However, the Court finds, based on the testimony of Dr. Jordan, that while there may be isolated exceptions, Folsom provides most strictly "necessary" treatment on a timely, medically sound basis.

U. Violence

60. Lockup units at San Quentin and Folsom are counted among the most violence-racked correctional facilities

in the United States.[29/] In part, this is due to the California Department of Corrections policy of concentrating the most violence-prone offenders in these two institutions. In part, it is caused by the horrendous physical conditions, including double-celling. In part, it is due to the crowding of both facilities beyond design capacity. In part, it may be due to the fact that lockup units have no programs. But in large measure, it originates in the violent propensities of segregated inmates themselves.

61. Segregated inmates manufacture and secrete weapons with exceeding resourcefulness. Specially-trained

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29/ Despite alarming overall levels of violence, the record contains no evidence that sexual assault is a particular problem in lockup except in instances where segregated inmates are double-celled.

security officers search lockup cells on a frequent, though random, basis, and confiscate numerous stabbing and clubbing implements. Lockup inmates are thoroughly searched on virtually every occasion they leave their cells. They are constantly monitored by guards heavily armed with both a shotgun and a rifle.[30/] Despite all of these precautions, assaults on inmates in lockup are common.

[30/] The Court heard convincing testimony that the constant use of firearms to cover inmates inside housing units is very rarely encountered in prisons outside California. Credible evidence also tended to show that the continuous presence of armed guards aggravates rather than mitigates the violent tendencies of inmates so confined. On the other hand, evidence also indicated that given the extremely violent tendencies of the present lockup population, removal of guns from the units would entail at least some element of risk.

62. Violence among inmates is frequently channeled through social organizations. Prison authorities and many inmates term these organizations "gangs" and ascribe to them colorful names such as "Aryan Brotherhood," "Mexican Mafia," and "Black Guerrilla Family." Expert sociologists who testified at trial expressed the view that these groups are neither as stable nor as well-organized as prison officials believe. Alliances and enmities among inmates shift constantly. The institutional labeling of an inmate as a gang member frequently proves to be a self-fulfilling prophecy. Fellow prisoners tend to accept the label, forcing the inmate to ally himself with others similarly labeled in order to survive. Inmates seeking to identify themselves with a gang sometimes perform

acts of violence in order to gain "membership." Factional strife and leadership struggles within gangs occasion violence, as do battles between rival gangs.

63. Both inmate and staff bystanders have been wounded or killed by stray gunfire, an alarming commentary upon the wisdom of maintaining guns within the units. See supra note 30. On occasion, gunfire has been used unnecessarily. The evidence does not, however, establish that mistreatment or unjustified violence directed at inmates by correctional officers is in any way countenanced by defendants. While shocking incidents have occurred, they have been carefully investigated.31/

31/ One such incident took place on
(Footnote Continued)

V. Overcrowding

64. Most of the Court's findings relative to crowding in lockup units have already been stated. The parties stipulated at trial that all California correctional facilities except one are seriously overcrowded. During the pendency of this action, San Quentin has housed 3,800 inmates in its 2,712 cells, and Folsom has housed 850 more than its 2,058 design capacity. Such overcrowding strains all environmental systems within the institution, and makes it difficult

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(Footnote Continued)

August 18, 1983, when a shotgun blast fired by a guard at close range permanently blinded inmate Anthony Martinez. In that instance, prison authorities, acting on a tip, conducted an investigation that uncovered the falsity of the explanation given by the guard for the shooting. The record does not show the nature of any disciplinary action taken, but reveals that the incident was referred to civil authorities for prosecution.

to provide decent conditions of confinement to lockup inmates.

W. Standards Governing Placement in Segregation

65. For an inmate at San Quentin or Folsom, the consequences of assignment to segregation are harsh. The inmate is substantially deprived of human contact (unless double-celled). He spends days and nights without respite in a dim, noisy, malodorous cubicle the size of a dog kennel. Probably this cubicle is infested with vermin. Sometimes it is cold as well. The inmate is denied "privileges" such as family visits and telephone calls. He has no work or program.

66. Because lockup inmates cannot hold jobs or take part in other programs, they cannot earn the full measure of worktime

sentence credit prescribed by Cal. Penal Code § 2933(a) (West's 1984 supp.). Although California law requires good-time credit to be afforded to inmates held in segregation without program, see id. §§ 2933(a), 2931(a), the evidence at trial did not establish that such credit is invariably afforded. Moreover, the inability to participate in a program reduces the amount of good-time credit that can be earned by any inmate, whether or not he is subject to the worktime sentence credit law. See Cal. Penal Code § 2931(c) (West's 1984 supp.) (one-fourth of possible good-time credit is "based solely upon participation in work, education, vocational, therapeutic or other prison activities"). In addition, the inability to participate in a program commonly retards the parole dates set for lockup inmates by making it impossible for them to comply with parole board recommendations. Thus, in the majority of cases, assignment to lockup significantly extends the total amount of time an inmate must spend in incarceration. The Court bases this finding not only upon a reading of applicable California law, but also upon the specific testimony of present and former inmates who appeared at trial.[32]

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[32] Kenneth Raines, 25, first arrived at San Quentin February 14, 1983, to begin serving a sentence for grand theft. He was immediately placed on "administrative segregation" for orientation. As he was not a Level IV inmate, he was transferred to San Quentin Ranch (a minimum security facility) 18 days later. Subsequently, while participating in a work furlough program, Raines was hospitalized following an auto accident. Correctional authorities found Raines "guilty, with an explanation" of failure to return, docked him 10 days' good time credit, and transferred him to Vacaville, where he was mistakenly categorized as a parole violator. Shipped back to San Quentin

(Footnote Continued)

67. In 1976, the Court ruled that inmates at San Quentin and Folsom had been segregated for "administrative" reasons arbitrarily and without observance of procedures required by the due process clause of the Fourteenth Amendment.[33/] Wright v. Enomoto 462

(Footnote Continued)

July 20, Raines was again placed in segregation. At San Quentin, he was first told that he would be released August 10. He was not released on August 10, however, because his segregated status and attendant lack of program prevented him from earning the further work credit on the basis of which the August 10 date had been calculated. On August 10, when Raines learned he wold not be released, he suffered a nervous breakdown. He was eventually released on August 30.

[33/] Specifically, the Court stated that:

> Defendants have consistently confined prisoners in maximum security segregation for administrative reasons without first giving them any meaningful hearing. Typically, the inmate is transferred to a maximum security unit before he is brought before the

(Footnote Continued)

F.Supp. 397, 400-04 (N.D. Cal. 1976). Accordingly, the Court ordered that inmates be provided with five procedural safeguards prior to assignment to segregation: (1) prompt written notice of the reasons for proposed segregation; (2) a fair hearing held no later than 72 hours after placement in segregation; (3) representation by a counsel-substitute when prison officials determine that the inmate is illiterate or the issues complex; (4) an opportunity to present witnesses and documentary evidence, unless prison officials determine in good faith that permitting

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(Footnote Continued)

Classification Committee. In many cases, prisoners have been confined in solitary for days--sometimes for weeks--before any hearing. In some cases, inmates have been so confined and not told the reasons, even informally, until appearance before the Committee. Wright v. Enomoto, 462 F.Supp. at 400.

such evidence would be unduly hazardous to institutional safety or correctional goals; and (5) a written statement of reasons for any decision to segregate. Id. at 404-05.

68. The order in Wright v. Enomoto has not received full compliance. Many prisoners are still placed in segregation without timely notice or hearing. The notice often is not, as required by the Court's order (462 F.Supp. at 404), "in sufficient detail to enable the prisoner to prepare a response or defense." For example, one "notice" states in full: "You have been placed on Administrative Segregation Status pending investigation that your continued presence in the general population poses a threat to the safety and security of the institution." Hearings, too, tend to be perfunctory. As a consequence, significant numbers of

inmates continue to be subjected to the privations of lockup arbitrarily and without evidence adequate to establish a reasonable belief that the inmates present a danger to others or a threat to the security of the institution.[34] See

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[34] Examples of arbitrary or inadequately documented lockups testified to by plaintiffs' witnesses include: A prisoner locked up as a gang member because his two brothers were so locked up; a prisoner locked up because he was observed talking to a gang member; a prisoner retained in lockup based on "confidential information" after being found not guilty of the offense of "pressuring activity;" a prisoner segregated because he once possessed a weapon, although he had since been in the general population; a prisoner locked up because he had once previously been locked up in another institution; and a minimum security prisoner transferred to San Quentin and locked up indefinitely following an argument with a guard. Two inmates who testified at trial are segregated, according to defendants, primarily because they chose to exercise in a yard used by reputed members of the "Aryan Brotherhood" and "Mexican Mafia." Despite defendants' strenuous argument to

(Footnote Continued)

Wright v. Enomoto, 462 F.Supp. at 403. Frequently the decision to segregate is based on unverifiable hearsay or "confidential information" from a source of unproven reliability identifying the inmate as a gang member.[35] The Program Administrator for a lockup unit at San Quentin admitted that gang membership determinations are generally reached prior to the classification hearing.

(Footnote Continued)

the contrary, the Court is not persuaded that these examples represent isolated instances.

[35] A witness with 44 years of experience in the fields of criminal justice and corrections testified that confidential inmate informants are "highly unreliable" and should not be credited without independent corroboration. The weight of evidence indicated that such informants are commonly manipulative and untruthful. Prison officials themselves admit that definitive gang member identification is almost impossible. Yet alleged gang members continue to be place and retained

(Footnote Continued)

69. Equally disturbing is the fact that inmates, once assigned to lockup, are retained there for inordinately long periods without any renewed justification for continued segregated confinement. As of mid-August, 1983, 548 inmates had been held continuously in lockup for more than one year, and 249 had been so held for over two years. Many are retained there solely because the original belief that the inmate is a "gang leader" has not been disproven. A vicious cycle emerges whereby the inmate, identified as a gang member, is assigned to exercise in the same yard with other reputed members of the gang, and through his association with these inmates the gang membership

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(Footnote Continued)

in lockup based on documentation that is, by the admission of one official, "sketchy."

identification is perpetuated. According to prison officials, an inmate cannot "disprove" an established gang identification without the aid of other inmates or staff. Consequently inmates frequently lose all hope of securing release from lockup.

70. Moreover, even inmates cleared for return to the general population remain confined in lockup, with its attendant prohibitions of work and denial of "privileges," for substantial periods due to lack of cell space in the rest of the prison. At the time of trial, approximately 169 such "holdover" inmates were confined in segregation at San Quentin alone.

X. Compliance With Court Orders

71. The record demonstrates that defendants have often failed to effect

prompt and proper compliance with orders of this Court. In addition to the Wright v. Enomoto order respecting placement in segregation, orders that have not been obeyed or that have been obeyed following excessive delay include those provisions of the preliminary injunction dealing with double-celling,[36] showers,[37] and exercise.[38] Correctional officers testified in court that they were unfamiliar with various provisions of the Court's orders during a contempt proceeding recently brought by plaintiffs. Defendants have yet to establish an adequate mechanism for ensuring compliance with the preliminary injunction and other Court orders. Greg Harding, the official charged by defendants with supervising compliance, testified that his authority is limited to developing plans to facilitate compliance, and does not include any power to investigate alleged violations of the injunction. Further obstacles to effective compliance spring from the fact that defendant Wardens, while well-intentioned, frequently prove unaware of actual events transpiring within the lockup units of their institutions.

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[36] Double-celling in excess of that permitted by the preliminary injunction was ordered terminated on August 3, 1983. It was not terminated until April 24, 1984, when a motion for civil contempt had been filed by plaintiffs.

[37] Some lockup inmates at San Quentin still do not receive three showers per week as required by the preliminary injunction.

[38] Defendants admit noncompliance with this provision. See supra note 24.

III. CONCLUSIONS OF LAW

A. Segregation Cells

[3] The cells in which plaintiffs are housed range between 45.5 and 56 square feet. Plaintiffs note that this is considerably less space than the minimum recommended by standards of bodies such as the American Correctional Association. However, it is an error to "constitutionalize" such standards. Hoptowit v. Ray, 682 F.2d 1237, 1249 (9th Cir. 1982); Newman v. State of Alabama, 559 F.2d 283, 288 (5th Cir. 1977); see also Rhodes v. Chapman, 452 U.S. 337, 348 & n. 13, 101 S.Ct. 2392, 2400 & n. 13, 69 L.Ed.2d 59 (1981). Plainly, cells of the size involved here are less than ideal places in which to confine human beings on a round-the-clock basis. But the Court concludes that, if all other conditions are satisfactory, segregating

inmates in the cells presently used for that purpose at San Quentin and Folsom is not inconsistent with minimum contemporary standards of decency. See Laaman v. Helgemoe, 437 F.Supp. 269, 310 (D.N.H. 1977). Consequently the use of such cells does not by itself constitute cruel and unusual punishment. See Rhodes, 452 U.S. at 346-47, 101 S.Ct. at 2399-2400; Hoptowit 682 F.2d at 1246.

[4] The evidence established that in addition to the cells regularly used to confine lockup inmates, defendants also sometimes employ "quiet cells" with solid outside doors. The use of such cells with the doors closed constitutes cruel and unusual punishment that violates the Eighth Amendment. Hoptowit, 682 F.2d at 1257.

B. Double-Celling

In Rhodes v. Chapman, the Supreme Court held that the double-celled confinement of segregated inmates at the Southern Ohio Correctional Facility (SOCF) did not violate the Eighth Amendment. See 452 U.S. at 342 n. 3, 349 n. 15, 101 S.Ct. at 2396 n. 3, 2401 n. 15. Other courts have reached similar conclusions. E.g. Union County Jail Inmates v. Di Buono, 713 F.2d 984, 1001 (3rd Cir. 1983), cert. denied, _____ U.S. ______, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984); Ruiz v. Estelle, 679 F.2d 1115, 1151 (5th Cir. 1982); Capps v. Atiyeh, 559 F.Supp. 894, 907 (D.Ore. 1982). However, conditions under which lockup inmates are double-celled at San Quentin and Folsom differ markedly from those prevailing at SOCF when Rhodes was decided. The Supreme Court characterized SOCF as a "top-flight, first-class facility," and noted that "though small, the cells in SOCF are exceptionally modern and functional; they are heated and ventilated and have hot and cold running water and a sanitary toilet." Rhodes, 452 U.S. at 341, 348 n. 13, 101 S.Ct. at 2396, 2400 n. 13. San Quentin and Folsom are old prisons presenting the "deplorable" and "sordid" conditions the Supreme Court contrasted with those at SOCF. See id. at 352, 101 S.Ct. at 2402; see also Union County Jail Inmates, 713 F.2d. at 1001 n. 30. In these prisons, unlike SOCF, double-celling increases violence among inmates and causes intolerable stress and psychiatric problems. Cf. Rhodes, 452 U.S. at 348, 101 S.Ct. at 2400. The constitutional significance of both distinctions was noted by the Ninth Circuit in affirming the double-celling provision of the preliminary injunction. Toussaint v. Yockey, 722 F.2d 1490, 1492-93 (9th Cir. 1984).

[5] The Court concludes, based on the virtually unanimous testimony of witnesses at trial, that the double-celling of segregated inmates at San Quentin and Folsom under conditions now prevailing or likely to prevail in the foreseeable future is cruel and inhuman, violating the Eighth Amendment.

C. Heating and Ventilation

[6] It is clear that adequate heating and ventilation are fundamental attributes of "shelter," which is a basic Eighth Amendment concern.[39] See Ramos

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[39] Ventilation is also required as an aspect of "sanitatation," another basic element of the decent treatment mandated
(Footnote Continued)

v. Lamm, 639 F.2d 559, 566, 568 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981); Martino v. Carey, 563 F.Supp. 984, 999 (D.Ore. 1983). An institution must therefore provide all inmates, including segregated inmates, with "adequate" heat and ventilation. See Hoptowit, 682 F.2d at 1246; Wright v. Rushen, 642 F.2d at 1129, 1132-33 (9th Cir. 1981); Newman, 559 F.2d at 286; see also Palmigiano v. Garrahy, 443 F.Supp. 956, 961, 979 (D.R.I. 1977), aff'd, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45 (1980). The evidence in this case established that, with the exception of a relative few inmates housed in the San Quentin

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(Footnote Continued)

by the Eighth Amendment. See Hoptowit, 682 F.2d at 1246.

Adjustment Center and Folsom SHU I, plaintiffs are not provided with either adequate heat or ventilation. This condition violates the Eighth Amendment.

D. Plumbing

[7,8] As an aspect of "sanitation," plumbing is a basic Eighth Amendment concern. See Ramos, 639 F.2d at 566, 568; Martino 563 F.Supp. at 999. consequently the plumbing in a facility used to house inmates, including segregated inmates, must be "adequate." See Hoptowit, 682 F.2d at 1246. The evidence established that the plumbing in most if not all of the units housing lockup inmates at San Quentin and Folsom is grossly inadequate. In fact, the leaking pipes and fixtures, clogged drains, rotting sewer lines, and other plumbing and sewage deficiencies are a

major cause of the serious health hazards prevalent in lockup units of the two prisons. These conditions are inconsistent with human decency, and violate the Eighth Amendment.

E. Lighting

[9,10] Lighting is an indispensable aspect of adequate shelter and is required by the Eighth Amendment. See Ramos, 639 F.2d at 568; Martino, 563 F.Supp. at 999. The physically and mentally debilitating effects of a lack of adequate lighting were noted in Palmigiano v. Garrahy, 443 F.Supp. at 961. The Court will not "constitutionalize" any particular expert standard. Rather, in the context of this case, the Court concludes that each inmate must be afforded sufficient light to permit him read comfortably while

seated or lying on his bunk.[40] Many if not most lockup inmates are not furnished with this amount of light, in violation of the Eighth Amendment.

F. Noise

[11] An obligation to furnish inmates a reasonably quiet living space does not, strictly speaking, fall within any of the categories of basic Eighth Amendment concerns enumerated in Hoptowit, although it could well be regarded as a component of the obligation to provide adequate shelter. However, the facts of this case leave no doubt that the constant level of noise is among the most intolerable

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[40] It is to be noted in this regard that lockup inmates at San Quentin and Folsom lack any facility (except the toilet) other than their bunks on which to sit while confined in their cells.

conditions now endured by lockup inmates confined in the five-tier cell blocks at both prisons. The level of noise is so extreme that it adversely affects their hearing and mental processes. Constant exposure to such a level of noise inflicts pain without penological justification. It also contributes to the creation of "a total environment where debilitation is inevitable, and which is unfit for human habitation and shocking to the conscience of a reasonably civilized person." Palmigiano, 443 F.Supp. at 979.

Noise is a troubling problem because much of it is caused by plaintiffs, collectively. However, courts have not hesitated to declare unconstitutional other indecent prison conditions caused by inmates themselves. See, e.g. Hoptowit, 682 F.2d at 1250 (violence);

Ramos, 639 F.2d at 572-73 (violence); Martino, 563 F.Supp. at 988-89, 991, 997, 999 & n. 7 (violence, sanitation); Palmigiano, 443 F.Supp. at 979. But cf. Holt v. Sarver, 309 F.Supp. 362, 378 (E.D.Ark. 1970) (conditions held to be of less concern when "due to the conduct of the inmates themselves"), aff'd, 442 F.2d 304 (8th Cir. 1971). The Court concludes that public conceptions of decency inherent in the Eighth Amendment require that plaintiffs be housed in an environment that, if not quiet, is at least reasonably free of excess noise.[41] The San Quentin Adjustment Center and SHU I at Folsom presently meet this standard.

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[41] It is relevant to this conclusion that plaintiffs, owing to the circumstances of lockup confinement, lack any means of removing themselves from the surrounding din for even brief periods of time.

the Five-tier cell blocks, including Folsom SHU II, do not.

G. Electrical Systems

[12] As an aspect of "shelter," a prisoner's electrical system falls within the purview of Eighth Amendment scrutiny. the denial of electricity to a segregated inmate's cell for a moderate period of time does not constitute cruel and unusual punishment. Electric wiring that presents a continuous danger of death or serious injury from fire or electrocution is another matter. See Ramos, 639 F.2d at 570. Such a danger is present in segregation units at both San Quentin and Folsom. This condition violates the Eighth Amendment.

H. Fire Safety

[13] Safety from fire is an aspect of "shelter," and as such is properly an area of Eighth Amendment concern. Consequently, a prison "unquestionably has a duty to provide adequate fire safety for its inmates." Ruiz, 679 F.2d at 1153; see Leeds v. Watson, 630 F.2d 674, 675-76 (9th Cir. 1980); Santana v. Collazo, 714 F.2d 1172, 1183 (1st Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 2352, 80 L.Ed.2d 825 (1984). Lockup units at both prisons are replete with fire hazards. Evacuation procedures are nonexistent or, at best, untested. Moreover, in contrast to Ruiz, see 679 F.2d at 1153, the record in this case shows that multiple fire-related fatalities have occurred. The fire safety in the lockup units involved in this case is so blatantly inadequate as to violate the Eighth Amendment.

I. Earthquake Safety

[14] Seismic safety is also an aspect of shelter. However, the Court is not persuaded that forcing prisoners to reside within a building that is not earthquakeproof contravenes public notions of decency. Numerous Americans live and work within such buildings without any perception that their shelter is inadequate. The seismic hazards documented in this case do not violate the Eighth Amendment.

J. Clothing, Laundry and Bedding

[15] Clothing is a basic area of Eighth Amendment concern. Hoptowit, 682 F.2d at 1246; Wright v. Rushen 642 F.2d at 1132-33; Newman, 559 F.2d 286. Prisoners in lockup at San Quentin and Folsom are permitted only state-issued clothing and a limited

quantity of approved private clothing. See 15 Cal.Admin.Code § 3032 91983). Defendants are under an obligation to ensure that this clothing is adequate and that it is adequately laundered on a regular basis. Toussaint v. Rushen, 553 F. Supp. 1365, 1379 (N.D.Cal. 1983), aff'd in relevant part, 722 F.2d 1490 (9th Cir. 1984). When laundry exchange is provided in accordance with defendants' internal policies, it is adequate. But at San Quentin, laundry exchange is not so provided. Weeks and months pass without affording lockup inmates an opportunity for clothing exchange. This violates standards of decency inherent in the Eighth Amendment.

[16] Reasonably clean, sanitary bedding is likewise required by the Eighth Amendment. See Ramos, 639 F.2d at 570; Toussaint v. Rushen, 553 F.Supp. at

1379. The bedding issued to lockup inmates is frequently filthy and unsanitary. This condition is indecent, and violates the Eighth Amendment. Decency also requires that each cell be furnished with a clean, untorn pillow. Many lockup cells are not so furnished. This, too, violates the Eighth Amendment.

K. Personal Hygiene

[17] The Fundamental requisites of sound personal hygiene are not directly listed among the Eighth Amendment concerns enumerated in Hoptowit, Wright v. Rushen, and Newman. However, the subject bears a clear relation to three such areas: shelter, sanitation, and medical care. See Martino, 563 F.Supp. at 999 ("[t]he provision of adequate means of hygiene, and the sanitary disposal of bodily wastes so

that the wastes do not contaminate the cells, are constitutionally required"). Many lockup inmates at San Quentin have no hot water in their cells and are not permitted indoor showers as rarely as once per week. Some regular access to a personal cleaning facility is critical for inmates such as these, living amidst the conditions of filth that prevail in lockup units of both prisons. The Court concludes that minimum standards of decency require that lockup inmates without hot running water in their cells be accorded showers three times per week in facilities reasonably free of standing water, fungus, mold and mildew.[42/] See

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[42/] Once again, it bears enphasis that the Court's conclusion is premised on the fact that the particular inmates who are plaintiffs in this case are locked in their cells around the clock and have

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15 Cal.Admin.Code § 3343(f) (1983) (evidence that this represents standard of decency). As this requirement is not presently met, conditions of personal hygiene violate the Eighth Amendment.

L. General Sanitation

A sanitary environment is a basic human need that a penal institution must provide for all inmates. See Hoptowit, 682 F.2d at 1246. Defendants do not dispute the fact that lockup units at San Quentin and Folsom are unsanitary. Rather, they argue that plaintiffs have not established that unsanitary conditions have made a substantial detrimental impact on their health. The

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absolutely no means of securing access to personal cleaning facilities outside their cells except those expressly allocated by prison authorities.

Court cannot accept this defense. The evidence at trial of cells without solid waste containers, service areas stinking of raw sewage and human feces and tiers encrusted with rotting garbage, amply establishes that conditions of sanitation in the lockup units involved in this case are inconsistent with any standard of decency and present a serious hazard to the health of each plaintiff. See Ramos, 639 F.2d at 570; Martino, 563 F.Supp. at 1000. Such conditions violate the Eighth Amendment.

M. Pests

[18] Active infestation of vermin such as rats, mice, birds, and cockroaches is inconsistent with the adequate sanitation required by the Eighth Amendment. At least some lockup units of each prison are plagued by each of these. Such

infestations are part and parcel of the general lack of adequate sanitation in the prisons, particularly the five-tier cell blocks. The failure of defendants to provide a reasonably pest-free environment for lockup inmates violates the Constitution.[43/]

N. Food

[19,20] Adequate food is a basic Eighth Amendment requirement. Hoptowit, 682 F.2d at 1246; Wright v. Rushen, 642 F.2d at 1132-33; Newman, 559 F.Supp. at 286. The food served to inmates is deficient under constitutional standards,

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[43/] The "inexcusable" nature of a rat infestation in isolation cells has been recognized. Holt v. Sarver, 309 F.Supp. 362, 378 (E.D.Ark. 1970). For another case ordering action to control pest infestation in a prison, see Palmigiano, 443 F.Supp. at 987.

even when nutritionally complete, if it is prepared under conditions so unsanitary as to make it unwholesome and a threat to the health of inmates who consume it. *E.g.* *Ramos*, 639 F.2d at 570-72 (holding food conditions constitutionally impermissible even though no specific instance of inmate sickness cited); *see also Leeds*, 630 F.2d at 676; *Palmigiano*, 443 F.Supp. at 962-63, 087; *Laaman v. Helgemoe*, 437 F.Supp. at 309. The facts established in this case pertaining to conditions of food preparation and delivery are like those held to violate the Constitution in *Ramos*. As noted above, the kitchen operation at San Quentin has already been declared unconstitutional in a state court action, and the kitchen at Folsom is, if anything, worse. The Court concludes that the provision to lockup inmates of food stored, prepared, and served under the unsanitary and unhealthful conditions now prevailing violates the Eighth Amendment.

O. Exercise

[21] As mentioned at the outset, exercise is solidly established as a constitutional requirement for all prison inmates. See Ruiz, 679 F.2d at 1152. The Ninth Circuit has ruled that inmates who were members of the plaintiff class in this case, housed in segregation at the San Quentin Adjustment Center for a period of years, must be accorded outdoor exercise one hour per day, five days per week, weather and prison exigencies permitting. Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979). On the other hand, a short-term denial of exercise to

an inmate for disciplinary or security reasons probably does not violate the Eighth Amendment. See Hayward v. Procunier, 629 F. 2d 599, 603 (9th Cir. 1980), cert. denied, 451 U.S. 937, 101 S.Ct. 2015, 68 L.Ed.2d 323 (1981); Spain, 600 F.2d at 200; Martino, 563 F.Supp. at 1000-01. The inquiry concerning the constitutional adequacy of exercise must proceed from the individual facts of each case. Toussaint v. Yockey, 722 F.2d at 1493. If plaintiffs were free to exercise or even walk about indoors for any significant period of time each day, outdoor exercise might not be required. Cf. Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980). However, plaintiffs have no such opportunity, but are confined within cells of less than 50 square feet virtually 24 hours per day. A substantial percentage are so confined for months or years. As the Ninth Circuit noted in affirming the preliminary injunction, these circumstances are similar to those present in Spain. Toussaint v. Yockey, 722 F.2d at 1493. The Court concludes that under circumstances of lockup at San Quentin and Folsom, each inmate must be provided with at least that degree of exercise required by the preliminary injunction, but that exercise may be suspended in the case of any inmate for a period not exceeding ten days for genuine reasons of discipline, inmate safety or prison security. Also, the Court concludes that decent "meaningful exercise" requires that when weather is inclement during a period of outdoor exercise, the exercising inmates be issued suitable rain gear.

Because these standards are not met, the exercise accorded plaintiffs violates the Eighth Amendment.

P. Visitation

[22] Visits, particularly contact visits, are undoubtedly important to effective penological administration. Contact visits give inmates something to look forward to, and promote and preserve social ties critical for any hope of successful reentry into the free world. However, contact visits also entail serious security risks. The record amply establishes that contact visits at both San Quentin and Folsom are often used by inmates to smuggle drugs, weapons and other contraband into the institution. For precisely this reason, the Supreme Court has concluded that the denial of all contact visits to pretrial detainees

held for over 30 days does not violate the due process clause of the Fourteenth Amendment. Block v. Rutherford, _____ U.S. ____, ____ – ____, 104 S.Ct. 3227, 3232-34, 82 L.Ed.2d 438 (1984). Eighth Amendment principles do not require a contrary result in this case involving convicted prisoners. See Ramos, 639 F.2d at 578-81; Newman, 559 F.2d at 291; see also Union County Jail Inmates, 713 F.2d at 998 (conditions permissible for pretrial detainees under due process clause a foriori permissible for convicted prisoners under Eighth Amendment). The visiting restrictions applied to segregated inmates by defendants, which deprive none of all visits and accord most contact visits, are not "so totally without penological justification" that they violate the

Eighth Amendment.[44] See Rhodes, 452 U.S. at 346, 101 S.Ct. at 2399; Gregg V. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1976) (plurality opinion).

Q. Telephone Service

[23] Plaintiffs cite no authority for the assertion that the complete denial to inmates of access to telephones violates contemporary standards of decency inherent in the Eighth Amendment. The Court cannot conclude that such a denial

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[44] Plaintiffs ask the Court as well to order that defendants provide some of them with opportunities for family visits. Such visits are plainly not required by the Eighth Amendment. The Court commends the efforts defendants have made to provide such visits to as many inmates as possible, and further commends the recent efforts defendants have made to improve and expand visiting facilities at Folsom.

of access is indecent, or that it violates the Constitution.

R. Legal Research Materials

Unlike plaintiffs' other claims, the claim respecting access to legal research materials is founded on the requirements of due process, not the Eighth Amendment. These requirements are quite specific: Prison authorities must assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with either access to adequate law libraries or adequate assistance from persons trained in the law. Bounds v. Smith, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977). Bounds and other cases condemn prison and jail *systems* that deny classes of inmates the required access. *E.g. id.* at 818-21, 97 S.Ct. at 1493-95; *Leeds*, 630 F.2d at 676-77; *Ruiz*, 679 F.2d at 1153-55; Ramos, 639 F.2d at 582-85; Wolfish, 573 F.2d at 133 (reversed on other grounds); Martino, 563 F.Supp. at 1003-04.

[25,26] Due process requires, in this respect, that the libraries available to inmates be "adequate" and that regulations governing inmate use of the library permit the meaningful use of the library. See Ramos, 639 F.2d at 583-85; Martino, 563 F.Supp. at 1003. The evidence in this case is not sufficient to permit the Court to conclude that the law library at either prison is presently inadequate. However, the current system of "paging" books is constitutionally deficient. See Martino, 563 F.Supp. at 1003; see also Williams v. Leeke, 584 F.2d 1336, 1338-39 (4th Cir. 1978), cert. denied, 442 U.S. 911, 99 S.Ct. 2825, 61 L.Ed.2d 276 (1979). Even an

individual highly trained in the law would be unable to secure meaningful access to the courts through such a system. See Ramos, 639 F.2d at 585.

S. Idleness

[27] The wisdom of defendants' present policy of confining all inmates in their cells around the clock, with no program or organized activity of any kind to occupy their time and attention, is dubious. Such confinement likely increases overall tension and promotes the very antisocial tendencies that segregation is supposed to control. Inmates without programs become ever less likely to succeed in becoming functional members of society, and ever more likely to follow a lifelong cycle of release, crime, and reimprisonment. As the Court has found, lockup confinement without

program produces extreme boredom, a form of psychological pain. However, the Court's function is not to sit in judgment of the policy choices of state officials. See Bell v. Wolfish, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed.2d 447 (1979). The Court must rather follow the recent admonition of the Ninth Circuit that programs for segregated inmates "simply are not constitutionally required." Hoptowit, 682 F.2d at 1258; see also Newman, 559 F.2d at 291.

Highly relevant to this conclusion is that in this case, the denial of programs to plaintiffs is not "totally without penological justification." At least in theory, each plaintiff has been selected for segregation on the basis of ~~criteria~~ indicating that he is in some way unfit or unsuited for intermingling with other inmate, whether because he has misbehaved, because he presents a threat to the safety of other inmates, or because he has requested isolation from other inmates for his own protection.[45] Thus, the Court's conclusion as to the constitutionality of confinement without programs might be different if the entire inmate population of an institution were denied any work, recreation, education, or vocational training. *Cf*. *Laaman*, 437 F.Supp. at 317-18; *Barnes v. Government of the Virgin Islands*, 415 F.Supp. 1218, 1226 (D.V.I. 1976).

T. Health Care at Folsom

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[45] Indeed, as discussed below, inasmuch as the State of California has chosen to make participation in work and other programs a factor significantly affecting the length of incarceration, the question whether these criteria are satisfied assumes constitutional due process significance.

[28] The standard of decency governing the medical care a penal institution must provide to its inmates was defined by the Supreme Court, in Estelle v. Gamble, 429 U.S. 97, 106 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976). The Eighth Amendment prohibits "deliberate indifference to serious medical needs" of prisoners. See Hoptowit, 682 F.2d at 1253; Ruiz, 679 F.2d at 1149. The infirmary at Folsom and the medical services provided lockup inmates at Folsom are perhaps inadequate from a strictly medical point of view, as Dr. Jordan, the Chief Medical Officer, testified. The doctor-patient ratio is less than experts recommend; however, it is error to "constitutionalize" such standards. Ruiz, 679 F.2d at 1150; see Laaman, 437 F.Supp. at 312. The health care delivered at Folsom, while properly

subject to criticism, is not as bad as that found to embody systemic "deliberate indifference" to inmate needs in other cases. Cf. Hoptowit, 562 F.2d at 1252 (prison lacked full-time chief medical officer, sick call was not conducted daily, and guards held discretion concerning whether inmates received treatment by physicians); Ramos, 639 F.2d at 575-78 (less than 10 hours per week of on-site primary physician coverage, and no on-site psychiatrist or psychologist provided); Capps v. Atiyeh, 559 F.Supp. 894, 911 (D.Ore. 1982) (record contained numerous instances of misdiagnosis or delayed diagnosis resulting in needless pain and injury); Martino, 563 F.Supp. at 989-91 (jail had no regular physician; all medical care supervised by nurse who attempted to diagnose inmate complaints).

The medical care provided lockup inmates at Folsom falls very near the constitutional borderline. Giving prison officials the benefit of the doubt, the Court concludes that the system of health care delivery at Folsom does not manifest "deliberate indifference to serious medical needs" of the inmates. See Hoptowit, 682 F.2d at 1253 (defining "deliberate indifference" in this context).

U. Violence

[29] Prison officials have a duty to protect inmates from constant threats of violence at the hands of other inmates and staff. Hoptowit, 682 F.2d at 1250; Ramos, 639 F.2d at 572. This duty is violated if officials are "deliberately indifferent to the safety needs" of the inmates. Id. Thus, courts must enjoin

aspects of jail and prison operations that unduly jeopardize inmate safety. Courts must also enjoin conditions of confinement that are directly and indisputably linked to continual fear and violence such as the double-celling involved in this case.

[30] Citing Hoptowit, plaintiffs suggest that the Court should infer the existence of deliberate indifference to inmate safety from the extraordinarily high levels of violence in lockup units at San Quentin and Folsom. See 682 F.2d at 1250. To establish a constitutional violation, however, it must be shown that in the face of such levels of violence, prison officials have failed to undertake reasonable steps to protect the inmates. See Doe v. District of Columbia, 701 F.2d 948, 961 (D.C. Cir. 1983) (concurring statement of Edwards, J.). One example

of such a violation is the failure to provide adequate guards. E.g., Hoptowit, 682 F.2d at 1250; Ramos, 639 F.2d at 573; Martino, 563 F.Supp. at 988; Holt, 309 F.Supp. at 382-84. Another is the failure to make any attempt to separate hardended, violent inmates from younger, vulnerable ones. E.g. Wright v. Rushen, 642 F.2d at 1134 n. 3; Martino, 563 F.Supp. at 997. Still another is the use of physical facilities that do not enable authorities to detect or prevent violence. E.g., Ramos, 639 F.2d at 573; Martino, 563 F.Supp. at 988. Of course, guard brutality is not tolerated. E.g., Hoptowit, 682 F.2d at 1249-50.

[31] This case involves no claim that any of these violations of the duty to prevent violence have occurred. to the contrary, plaintiffs attack practices, such as the maintenance of armed guards

within the lockup units and the continuous confinement of segregated inmates, that are clearly intended to deter and prevent violence.[46/] It is possible that as various witnesses testified, many or all of the challenged practices are in the long term counterproductive. Again, however, it is not the Court's function to judge the relative wisdom of defendant's policies. Defendants' challenged practices do not manifest "indifference," nor are they so plainly misguided as to be "totally without penological justification." They are not unconstitutional.

[46/] To the extent that plaintiffs challenge as excessive the modes of force authorized by defendants, such as tear gas and high-powered rufles, the evidence fails to establish that the actual use of such devices exceeds constitutional limits. *See generally* *Spain v. Procunier*, 600 F.2d 189, 193-96 (9th Cir. 1979).

V. Overcrowding

[32] Overcrowding per se is not unconstitutional, although the conditions resulting from overcrowding may be. Fischer v. Winter, 564, F.Supp. 281, 298 (N.D.Cal. 1983). Plaintiffs ask the Court to rule that the overcrowding in the entire California prison system is unconstitutional because it is the root cause of the evils identified herein. The Court will not so rule. If all of the above-discussed conditions violating the Eighth Amendment are punctiliously remedied, and no new violations permitted to arise, then conditions will be decent and segregation at San Quentin and Folsom will no longer constitute cruel and unusual punishment as it does now. The State of California prison system is not before the Court.

W. Standards Governing Placement in Segregation

If any facet of this case is more shocking than the physical conditions to which plaintiffs are subjected, it is the absolute capriciousness with which inmates are selected to suffer the grievous fate of assignment to segregation. Eight years ago, the Court entered an injunction designed to relieve the due process concerns raised by such arbitrary assignments. Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976), aff'd, 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978). This order proved insufficient to end arbitrariness, partly because it did not receive full compliance. The Court therefore ordered further injunctive relief. Toussaint v. Rushen, 553 F.Supp. 1365, 1386-87 (N.D.Cal. 1983), aff'd in relevant part, 722 F.2d 1490 (9th Cir. 1984). While affirming this grant of further relief, entered as part of a preliminary injunction, the Ninth Circuit noted that intervening decisions call into question whether defendants' arbitrary practices violate either the cruel and unusual punishment clause of the Eighth Amendment or the due process clause of the Fourteenth Amendment. Toussaint v. Yockey, 722 F.2d at 1494 n. 6 While expressing no doubt as to the controlling force of Wright v. Enomoto as the law of the case, the footnote suggested that this Court should reconsider whether any further relief is warranted.

The Court, upon such consideration, concludes that further injunctive relief must be entered for three separate reasons.

[33,34] First, relief is needed to ensure that prisoners are not deprived of

a liberty interest without due process of law. The Supreme Court in Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), held that although there is no federally protected liberty interest in freedom from the strictures of administrative segregation standing alone, id. at 869-70, such a liberty interest can arise from the mandatory language of a state statute or regulation, id. at 871. For purposes of this case, the relevant statutes creating a liberty interest in freedom from assignment to segregation are the California worktime laws, Cal.Penal Code §§ 2931, 2932, and 2933.[47] Set forth at length in the margin, these laws require

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[47] Cal.Penal Code § 2921 is the basic good time credit law applicable to all prisoners whose crimes were committed prior to January 1, 1983. That section reads, in part pertinent to the issues
(Footnote Continued)

(Footnote Continued)

here:

> (c) One month of [the maximum allowable] reduction [in the term of imprisonment] ... shall be based solely upon participation in work, educational, vocational, therapeutic or other prison acitivities. [T]hose confined for other than behavior problems shall be given specified activities commensurate with the custodial status.

(Emphasis added).

Cal.Penal Code § 2933 is the good time credit law applicable to all prisoners whose crimes were committed on or after January 1, 1983, and to any other prisoner who elects to be governed by its provisions pursuant to Cal.Penal Cose § 2934. It states in part:

> (a) It is the intent of the Legislature that persons convicted of crime and sentenced to state prison ... serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Department of Corrections for performance in work, training, or education programs established by the Director of Corrections ...
>
> (b) ... Except as provided in subdivision (a) of section 2932, every prisoner shall have a reasonable opportunity to participate in a a full-time credit

(Footnote Continued)

that each California inmate "shall" be

(Footnote Continued)

> qualifying assignment in a manner consistent with institutional security and available resources.

(Emphasis added).

Cal.Penal Code § 2932(a) provides, in part:

> (a) For any time credit accumulated pursuant to Section 2931 or to Section 2933, not more than 180 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a felony whether or not prosecution is undertaken. Not more than 90 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a misdemeanor, whether or not prosecution is undertaken. Not more than 30 days of credit may be denied or lost for a single act of misconduct defined by regulation as a serious disciplinary offense by the Department of Corrections. Any person confined due to a change in custodial classification following the commission of a serious disciplianary infraction shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days credit which have been lost for such act of misconduct. In unusual cases, an inmate may be denied the

(Footnote Continued)

afforded an opportunity to earn a reduction in time served by participating in qualifying work, training, or educational programs, unless the inmate has committed specific misconduct amounting to at least a "serious disciplinary infraction" or, in "unusual cases," where "the Director of Corrections finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a

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(Footnote Continued)

opportunity to participate in a credit qualifying assignment for up to six months beyond the period specified in this subdivision if the Director of Corrections finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a substantial risk of physical harm to staff or other inmates. At the end of the six-month period and of successive six-months periods, the denial of the opportunity to participate may be renewed upon a hearing and finding by the director.

substantial risk of harm to staff or other inmates."[48] Cal.Penal Code §§ 2931(c), 2933(b), 2932(a) (West's 1984 supp.).

As the Court has found, the assignment of inmates to segregation at San Quentin and Folsom, as it is presently administered, deprives them of any opportunity to participate in work, educational, or vocational programs, and thereby deprives them of the opportunity to earn full sentence credit. However, the mandatory "shall" language of section 2932(a) creates an expectation protected by the due process clause of the Fourteenth Amendment that his deprivation will not be imposed absent satisfactory proof of one of the grounds listed in that section.[49] *Cf*. *Olim v. Wakinekona*,

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[48] Inmates are also afforded extensive procedural protections in connection with resolution of the question whether these standards have been met. See Cal.Penal Code § 2932(a), (c).

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[49] Defendants, on motion to alter or amend the judgment, maintain that the California work-time laws do not create any protected liberty interest because Cal.Panal Code § 2922(b) states "Worktime credit is a privilege, not a right.: However, the Supreme Court has "rejected the concept that constitutional rights turn upon whether a govermental benefit is characterized as a 'right' of [sic] a privilege'." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) (quoting *Graham v. Richmondson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971)). *But see* *Hill v. Denton*, No. C 83-4745 WHO (N.D Cal. filed Aug. 10, 1984) (unpublished order).

Defendants also cite *In re Cleaver*, 158 Cal.App.3d 770, 204 Cal.Rptr. 835 (1984), in support of their argument that the worktime statutes create no constitutional entitlements to participate in a program. That case, however, does not deal with the question of whether the worktime statutes give rise to any liberty interest, but merely holds that a pretrial detainee is not depreved of equal protection of the law or the due process right to a jury trial because he is excluded from the benefits

(Footnote Continued)

461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983) ("a State creates a protected liberty interest by placing substantive limitations on official discretion"). In this respect, the case is similar to Wolff v. McDonnell, 418 U.S. 539, 555-59, 94 S.Ct. 2963, 2974-76, 41 L.Ed.2d 336 (1976), in which the Supreme Court found that Nebraska statutes and regulations created a protected liberty interest in freedom from arbitrary deprivation of good time credit. In the context of that case, the Court concluded that "[s]ince prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes

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(Footnote Continued)

of the worktime statute. Id. 204 Cal.Rptr. 835 at 837-38.

critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." Id. at 558, 94 S.Ct. at 2976.

This case is unlike both Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), and Montanye v. Haymes, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976), neither of which involved any state-created expectation amounting to a liberty interest.[50] Meachum, 427 U.S. at 226, 96 S.Ct. at 2539; Montanye, 427 U.S. at 243, 96 S.Ct. at 2547. Also, unlike in Meachum, Montanye and Hewitt, assignment to programless lockup at San Quentin or

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[50] For the same reason, this case is unlike Gibson v. Lynch, 652 F.2d 348 (3d Cir. 1981), cert. denied, Stanley v. Zimmerman, ______ U.S. ______, 103 S.Ct. 3123, 77 L.Ed.2d 1375 (1983).

Folsom increases the length of time the inmate is required to spend in custody. Cf. Meachum, 427 U.S. at 222, 96 S.Ct. at 2537; Montanye, 427 U.S. at 238, 96 S.Ct. at 2545; Hewitt, 103 S.Ct. at 870. While not a prerequisite to the existence of a liberty interest, see Hewitt, 103 S.Ct. at 870-71, this factor assumes importance here because it augments the quantum of "process" that is due. See id. at 872; compare Wolff, 418 U.S. at 4564-72, 94 S.Ct. at 2978-82 (procedures required where length of time in custody is affected) with Hewitt, 103 S.Ct. at 872-74 (procedures required where length of time is not affected).

[35] The second basis for entering further injunctive relief concerning placement of plaintiffs in segregation is that the conditions of such segregation, as the Court concludes above, violate the

Eighth Amendment. As a general rule, even an indeterminate assignment to punitive isolation does not constitute cruel and unusual punishment, and a court is not warranted in imposing limits on such assignments. Toussaint v. Yockey, 722 F.2d at 1494 n. 6; see Gibson v. Lynch, 652 F.2d 348, 352-53 (3d Cir. 1981). When the conditions of confinement in segregation violate the Eighth Amendment, however, assignment to segregation subjects an inmate to a form of cruel and unusual punishment. The Supreme Court has specifically held that a court may regulate the length of time an inmate can be required to spend confined in segregation in the midst of indecent unconstitutional conditions. Hutto v. Finney, 437 U.S. 678, 685-87, 98 S.Ct. 2565, 2570-72, 57 L.Ed.2d 522 (1978). Logically, the same considerations permit a court to regulate initial placement in segregation amidst such conditions as well. See Hewitt, 103 S.Ct. at 876 n. 4 (opinion of Stevens, J.).

In this case, the basic reason why the Court will allow defendants to continue operating the existing segregation units, rather than ordering transfer of all inmates out of those units until all constitutional violations are remedied, is that prison security would be unduly jeopardized by the latter remedy. See Part IV, infra. For so long as lockup conditions continue to violate the Eighth Amendment, the Court must scrutinize the reasons assertedly justifying placement and retention of each inmate in segregation to ensure that they correspond to legitimate security considerations.

The third and final ground for entry of further relief concerning standards governing assignment to segregation is that the Court's prior order in Wright v. Enomoto has been consistently overlooked or disobeyed. The Court's power to grant further relief to effectuate the prior order is well established. Toussaint v. Yockey, 722 F.2d at 1494 (upholding this Court's order requiring periodic review of reasons for retention in segregation); see Hoptowit, 682 F.2d at 1247; Ruiz, 679 F.2d at 1155; see also Hutto, 437 U.S. at 687, 98 S.Ct. at 2571.

X. Compliance with Court Orders

[36] Evidence at trial established that numerous provisions of the preliminary injunction and other orders entered by the Court in this case have been disregarded by defendants and their

employees. The record of compliance is spotty at best. Still more disturbing, the evidence revealed that cruel and unusual punishments such as the use of "quiet cells" are sometimes inflicted without defendants' knowledge or permission. The Court expects that each and every provision of the permanent injunction to be entered will be scrupulously observed. However, the history of noncompliance compiled by defendants over the ten-year course of this litigation must guide the Court in shaping a remedial decree.

The record of noncompliance constitutes an "exceptional condition" requiring the appointment of a Special Master pursuant to Fed.R.Civ.P. 53(a) to monitor compliance with the permanent injunction. See Ruiz, 679 F.2d at 1160-61; Gary W. v. State of Louisiana, 601 F.2d 240, 245 (5th Cir.1979); Newman, 559 F.2d at 290; Gautreaux v. Chicago Housing Authority, 384 F.Supp. 37 (N.D.Ill.1974). The appointment of a monitor is also required by the complex nature of the litigation and of the measures defendants must undertake to effect prompt compliance with constitutional standards required by the injunction today ordered. See Hoptowit, 682 F.2d at 1263; Ruiz, 679 F.2d at 1160 & n. 238. Courts have not hesitated to appoint a monitor or other similar officer when required to secure effective relief for unconstitutional jail or prison conditions. E.g., McMurry v. Phelps, 533 F.Supp. 742, 774 (W.D.La. 1982); Powell v. Ward, 487 F.Supp. 917, 935 (S.D.N.Y. 1980) (special master appointed to oversee and report on compliance with order governing placement

in segregation where defendants exhibited lack of concern for state of compliance with prior order), modified in part on other grounds, 643 F.2d 924 (2d Cir.), cert. denied, 454 U.S.832, 102 S.Ct. 131, 70 L.Ed.2d 111 (1981); Jones v. Wittenberg, 73 F.R.D. 82, 85 (N.D. Ohio 1976); Pugh v. Locke, 406 F.Supp. 318, 331-32 (M.D.Ala. 1976), modified sub nom. Newman v. State of Alabama, 559 F.2d 283 (5th Cir. 1977); Miller v. Carson, 401 F.Supp. 835, 841 (M.D. Fla. 1975), modified, 563 F.2d 741 (5th Cir. 1977).

Accordingly, the Court will appoint a monitor as Special Master to report to the Court from time to time concerning the state of compliance with the permanent injunction. The monitor shall serve only until such time as it is clear that defendants have put an end to the violations of constitutional rights prohibited by the injunction. Compensation of the Master will be fixed by the Court and paid by defendants as a part of the costs of this litigation. Fed.R.Civ.P. 53(a); See Newman, 559 F.2d at 290; Valentine v. Englehardt, 474 F.Supp. 294, 304 (D.N.J. 1979).

IV. RELIEF

[37-39] The proper remedy for conditions of confinement violating the Eighth Amendment is an order enjoining further confinement under such conditions. See, e.g., Hutto v. Finney, 437 U.S. 678, 685-88, 98S.Ct. 2565, 2570-72, 57 L.Ed.2d 522 (1978); Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982); Ruiz v. Estelle, 679 F.2d 1115, 1144-45 (5th Cir. 1982); Ramos v. Lamm, 639 F.2d 559, 586 (10th Cir. 1980). In framing its order, the Court must

consider the cost of compliance and the effects of the relief upon prison security. Hoptowit, 682 F.2d at 1247; Wright v. Rushen, 642 F.2d at 1134. Generally speaking, these considerations preclude a court from ordering immediate closure of a facility violating Eighth Amendment standards, which would certainly be the fastest and most effective means of eradicating the constitutional violation itself. See, e.g., Ramos, 639 F.2d at 585-86. Instead, the remedial order must address only the specific conditions that violate the Constitution, and only to the extent required to correct the specific violations.[51] Hoptowit, 682 F.2d at

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[51] A remedy may go beyond this, however, when there is a record of past constitutional violations and violations

(Footnote Continued)

1247; see Wright v. Rushen, 642 F.2d at 1133-34. If the state has undertaken bona fide steps to alleviate poor prison conditions, courts should defer to the policy choices the state has made when shaping its remedy.[52] Hoptowit, 682 F.2d at 1247.

In formulating a permanent injunction to enter in this case, the Court has considered all of these admonitions.

[40] The permanent injunction to be entered will require substantial and

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(Footnote Continued)

of past court orders. Hoptowit, 682 F.2d at 1247.

[52] This admonition has little application here. The record is devoid of evidence indicating that defendants have formulated and implemented plans for improving lockup conditions at San Quentin and Folsom absent prodding form the Court, despite the many recommendations from numerous sources that such conditions be alleviated.

immediate expenditures by defendants. However, cost cannot stand in the way of eliminating conditions that violate the Eighth Amendment. Wright v. Rushen, 642 F.2d at 1134; Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979); Ahrens v. Thomas, 434 F.Supp. 873, 898 (W.D.Mo. 1977), modified, 570 F.2d 286 (8th Cir. 1978). Rather, cost considerations govern only the selection among alternative remedial options. See Wright v. Rushen, 642 F.2d at 1134. The Court has deferred to such concerns by requiring in the preliminary injunction only, in most instances, that conditions be brought within constitutional requirements. Where specific remedial actions are ordered, it is because the evidence sufficiently establishes such actions to be the only feasible and satisfactory means of curing the deficiencies in question.

The Court has framed the permanent injunction with full awareness that many of the inmates affected are among the most dangerous, violent men in the State of California. Plainly, defendants are reasonable in maintaining that there is a need to keep some of these prisoners from mingling with the general prison population. Consequently, upon a showing that one of several criteria relating to concerns of inmate safety or prison security is met, the injunction will permit the segregated housing of an inmate during the interim period i which unconstitutional conditions of confinement have not yet been completely eliminated. The injunction will also allow the assignment, during the interim period, of an inmate to a reasonable term of segregation for punitive reasons, if defendants satisfactorily show that the inmate has been guilty of serious misbehavior.

The Court is satisfied that no relief provided in the permanent injunction is incompatible with legitimate security concerns. As an added safeguard, however, the injunction permits the Director of the California Department of Corrections, or the Warden of either prison, temporarily to suspend compliance during a state of genuine emergency. See Hoptowit 682 F.2d at 1259; Hayward v. Procunier, 629 F.2d 599, 603 (9th Cir. 1980).

The foregoing constitute the Findings of Fact and Conclusions of Law upon which the Judgment of Permanent Injunction has this day been rendered.

ORDER OF REFERENCE

For reasons set forth in the Findings of Fact and Conclusions of Law entered this day, the Court has determined that this is a proper case for reference to a Special Master pursuant to Federal Rule of Civil Procedure 53. In this order, the Special Master to be appointed will be referred to as "Monitor." See Fed.R.Civ.P. 53(a).

IT IS HEREBY ORDERED that the duties of the Monitor are and shall be the following:

1. To inspect from time to time each facility affected by the Court's Permanent Injunction entered this day governing the California State Prison at San Quentin ("San Quentin") and the California State Prison at Folsom ("Folsom").

2. To report to the Court from time to time concerning the state of compliance with the permanent Injunction and the state of conditions of confinement in segregation at San Quentin and Folsom.

3. To advise the Court concerning any modification or modifications to the Permanent Injunction that may appear necessary or that may be requested by a party.

4. To review the placement and retention of prisoners in segregation, as provided in Part IV(D) of the Permanent Injunction.

5. To perform such other duties as the Court may assign.

The Monitor shall continue to perform these duties until such time as he may be relieved by the Court or until the Court may adopt the Monitor's written report that defendants are in full compliance with the Permanent Injunction and that conditions of confinement in segregation units at San Quentin and Folsom do not violate the Constitution. Should the Court relieve the Monitor of his duties, the Court shall have power to appoint a successor.

IT IS FURTHER HEREBY ORDERED that the powers of the Monitor are and shall be the following:

1. To enter, at any reasonable time, with or without advance notice, any part of any facility affected by the Permanent Injunction.

2. To interview, on a confidential basis or otherwise, any person, including any correctional staff member or inmate, affected by the Permanent Injunction. Defendants shall provide suitable facilities and arrangements for the

conduct of such interviews under conditions satisfactory to the Monitor.

3. To attend institutional meetings and proceedings required by the Permanent Injunction.

4. To obtain any document in the possession of any party relevant to the state of compliance with the Permanent Injunction or the state of conditions of confinement at San Quentin and Folsom.

5. To require the posting of notices in any part of any facility affected by the Permanent Injunction, in such number and form as the Monitor may direct.

6. To convene hearings concerning any matter relating to the state of compliance with the Permanent Injunction, the state of conditions of confinement in segregation at San Quentin or Folsom, or the placement or retention of any prisoner in segregation. To this end,

the Monitor is empowered to require the attendance of witnesses, including both prisoners and employees of the California Department of Corrections, to make a record of the proceedings, and to exercise all other powers described in Federal Rule of Civil Procedure 53(c).

7. To retain from time to time experts, specialists, or other persons whose advice or testimony the Monitor deems necessary or desirable for the purpose of making findings concerning the conditions of confinement in segregation at San Quentin or Folsom.

8. To review the placement and retention of prisoners in segregation, and to require the release of prisoners assigned to segregation without sufficient basis, in accordance with the provisions of Part IV(D) of the Permanent Injunction.

IT IS FURTHER HEREBY ORDERED that prior to filing any of his reports with the Court, the Monitor shall serve copies of the proposed report upon one designated representative of counsel for plaintiffs and one designated representative of counsel for defendants (hereafter referred to as the two "sides"). The Monitor shall afford a reasonable time within which specific written objections to the proposed report or any part thereof may be submitted by either side. Upon the request of either side, submitted in conjunction with specific written objections, the Monitor shall convene a hearing prior to filing the report with the Court. All reports of the Monitor shall be filed in accordance with Federal Rule of Civil Procedure 53(e)(1).

IT IS FURTHER HEREBY ORDERED that any report of the Monitor shall be adopted as the findings of fact and conclusions of law of the Court unless, within ten days after being served with notice of the filing of the report, either side moves to reject or modify the report. The Court will entertain no objection to any report unless it is shown as a preliminary matter that an identical objection was submitted to the Monitor in the form of a specific written objection in accordance with the preceding paragraph of this Order. In accordance with Federal Rule of Civil Procedure 53(e)(2), the Court shall accept the Monitor's findings of fact unless clearly erroneous.

IT IS FURTHER HEREBY ORDERED that the Monitor shall be compensated at the rate of Seventy-Five Dollars ($75.00) per hour for services performed in accordance with this Order. This rate has been determined by the Court by reference to the rate the Monitor named herein would reasonably charge for comparable services performed for private clients, and is subject to change by further order of the Court. All reasonable expenses incurred by the Monitor in carrying out his duties under this Order shall be reimbursed as costs of the mastership.

IT IS FURTHER HEREBY ORDERED that costs of the mastership, including the Monitor's fees and expenses, shall be borne by defendants as part of the costs of this action. The Monitor shall submit to defendants or their designated representative periodic itemized statements of fees and expenses. All fees and expenses to requested shall be paid by defendants within fourteen (14) days of the receipt of each statement.

IT IS FURTHER HEREBY ORDERED that unless inconsistent with the express provisions of this Order of Reference, Federal Rule of Civil Procedure 53 shall govern all questions relating to the scope of this reference and the Monitor's duties and powers hereunder.

IT IS FURTHER HEREBY ORDERED that Robert B. Riggs is appointed to serve as Monitor for the Court in this action. Mr. Riggs is a member of the State Bar of California and the bar of this Court. He received the degree of Juris Doctor from Stanford Law School in 1982, where he graduated with an outstanding record. He has since served as a law clerk for a judge of the United States Court of Appeals for the Ninth Circuit. He has also served for more than a year as a law clerk for the judge presiding in this action. In that capacity, he has ably assisted the Court in connection with all aspects of the case. Acting as law clerk-crier, Mr. Riggs was present in the courtroom nearly every day of trial. He is thoroughly familiar with the entire record in this action and with the law applicable to the issues presented He is also thoroughly familiar with the Findings of Fact, Conclusions of Law, and Permanent Injunction entered by the Court herein. The Court reposes special confidence in him and his capacity to serve reliably and effectively as Monitor.

JUDGMENT OF PERMANENT INJUNCTION

Based upon the Findings of Fact and Conclusions of Law this day filed:

IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

Defendants, the Director of the California Department of Corrections, the Wardens of the California State Prison at San Quentin and California State Prison at Folsom, their agents, servants, employees, successors in office and all persons acting in their aid or in participation with them, are advised, enjoined and ordered as follows:

I.

It is not the intent of this Permanent Injunction to prohibit nor does it prohibit the Director or any Warden from temporarily suspending compliance with all or any part of this Injunction during a state of riot or turmoil or other genuine emergency. The determination by the Director or Warden that a state of genuine emergency exists shall be set forth in writing as soon as reasonably possible, shall detail briefly with reasonable specificity the reasons for the determination, and shall be reviewable by the Court at the request of either party. The Court may permit any party to submit affidavits and documentary evidence relevant to the correctness of the determination, and may also, in its discretion, provide for the taking of discovery or oral testimony. The determination of the Director or Warden, if supported by substantial evidence, shall be conclusive. The monitor hereinafter provided for may receive such affidavits and documentary evidence, provide for such discovery and oral testimony and, on the basis thereof, make recommendations to the Court as to what action, if any, it should take in review.

II.

Defendants, by immediate and continuous efforts, shall provide as follows with respect to all present and future members of the plaintiff class:

1. Each prisoner, upon initial assignment to segregation and upon each cell transfer while remaining in segregation, shall be provided with a clean cell, furnished with at least a bed, cot or bunk and a clean, untorn mattress, a clean, untorn blanket, a clean, untorn pillow, a properly functioning toilet and a properly functioning sink.

2. No prisoner assigned to segregation shall be involuntarily double-celled with

another prisoner in any cell smaller than seventy (70) square feet.

3. All cells in which prisoners assigned to segregation are housed shall be provided with adequate heat and adequate ventilation. Defective or clearly inadequate heating and ventilating equipment and broken windows shall be repaired or replaced promptly.

4. Each facility used to house prisoners assigned to segregation shall be equipped with adequate plumbing and sewage disposal systems. Leaking pipes and fixtures, clogged or defective drains, and clogged or defective sewer lines shall be repaired or replaced promptly.

5. Any prisoner assigned to a cell in which there is no significant source of natural light, or from which all significant natural light can be excluded

without the control of the prisoner, shall have under his control at all times a source of artificial light adequate to illuminate the cell. All cells used to house prisoners assigned to segregation shall be equipped with a source of artificial illumination sufficient to permit the occupant to read comfortably while seated or lying on his bunk or bed. All electric lights inside cells shall be connected to a functioning on-off switch that is under the control of the occupant during hours when the use of such lights is permitted.

6. Defendants shall undertake immediate steps to abate the levels of noise prevailing in five-tier cell blocks used to house segregated inmates. The following specific measures shall be undertaken unless and until defendants reduce the noise to acceptable levels by

alternate means: (1) Inmates shall not be permitted to employ any loudspeaking device, including, for example, those devices included in televisions, radios, and stereophonic equipment, unless the device is incapable of producing sound noticeably audible to any person outside the cell of the inmate using the device. (2) Defendants shall install sound-absorbing wall coverings in all five-tier units. (3) Defendants shall provide each inmate assigned to segregation and housed in a five-tier cell block with a set of medically approved sound exclusion devices such as, for example, earplugs. If earplugs are used, they shall be issued monthly.

7. Each facility used to house prisoners in segregation shall be equipped with electrical wiring

reasonably safe from danger of fire or electrocution.

8. Each facility used to house prisoners in segregation shall be reasonably safe from danger of death or serious injury caused by fire. Defendants shall develop and rehearse plans for the speedy egress of all segregated inmates in the event of serious fire.

9. Each prisoner assigned to segregation shall be provided with clean, untorn clothing reasonably appropriate in size. Such clothing shall be laundered on a regular, not less than bi-weekly, basis. Blankets shall be laundered not less than once every six months. Towels and sheets shall be laundered not less than once every two weeks. This provision does not require defendants to relieve any prisoner of the consequences

to that prisoner of damage done deliberately by the prisoner to clothes, blankets, towels or sheets.

10. Each prisoner assigned to segregation and housed in a cell without hot running water shall be permitted no less than three (3) showers each week. All shower facilities used by prisoners assigned to segregation shall be maintained in reasonably sanitary conditions with adjustable hot and cold running water. Defendants shall ensure that each prisoner assigned to segregation is supplied with adequate quantities of materials necessary to sound personal hygiene.

11. Each facility used to house segregated inmates shall be maintained in sanitary condition. Defendants shall undertake the following specific measures to ensure adequate sanitation: (1) Each

prisoner shall be required to maintain his cell in reasonably sanitary condition. (2) Each prisoner shall be provided with a container in which to store garbage. Garbage shall be collected from each cell on a regular basis not less than once every day. (3) Tiers and floors shall be maintained in a reasonably clean and sanitary condition. (4) "Pipe chases" or service areas shall be maintained in reasonably clean and sanitary condition, free of sewage, refuse, standing or leaking water, or any other noxious substance (including gases). (5) Standing water shall be promptly removed from any portion of any unit in which it may accumulate. If necessary, drains shall be installed to carry out this provision.

This provision does not require defendants to relieve any prisoner of the consequences to that prisoner of any damage, misbehavior, or failure to perform required cleaning tasks done or omitted deliberately by that prisoner.

12. Each unit used to house prisoners in segregation shall be maintained reasonably free of rodents, birds, insects and other vermin. Unless and until the intendment of this provision is accomplished by alternate means, defendants shall employ on a full-time basis at each prison at least one person whose exclusive duty is to manage the task of eradicating vermin.

13. All food shall be stored, prepared and served under healthful, sanitary conditions, free of spoilage or vermin infestation.

14. Each prisoner assigned to segregation shall be provided with an

opportunity for outdoor exercise at least:

(a) one (1) hour every other day, for a minimum total of eight (8) hours per week; or

(b) two (2) hours every other day, for a minimum total of eight (8) hours per week; or

(c) three times per week, for a minimum of one (1) hour each time, for a minimum total of ten (10) hours per week.

The provision of exercise may be suspended for a period not to exceed ten days as to any prisoner if the suspension is based upon genuine reasons of discipline, inmate safety or prison security. When weather is inclement during a period of outdoor exercise, exercising inmates shall be issued suitable rain gear.

15. In the absence of specific and compelling security reasons, documented in writing, all prisoners assigned to segregation shall be permitted to visit and use an adequate prison law library as reasonably necessary. Any prisoner denied direct access to the law library for documented reasons of security shall be permitted to order at least five books per week from that library. Books so ordered shall be delivered promptly and without fail. Each prisoner assigned to segregation shall be provided upon request with a complete listing of all books available in the prison law library and all books, if any, available to prisoners from other sources.

III.

A.

The requirements of the order entered by the Court in Wright v.

Enomoto, 462 F.Supp. 397, 404-05 (N.D. Cal. 1976), aff'd, 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978), remain in full force and effect. All of those requirements are hereby incorporated in this Permanent Injunction as if set forth in full herein.

B.

For the reasons detailed in the Findings of Fact and Conclusions of Law, the relief granted in Wright v. Enomoto failed to correct defendants' arbitrary practices in imposing segregation for "administrative" reasons, and in retaining prisoners in segregation for such reasons. Defendants shall provide the following additional procedural safeguards to all present and future members of the plaintiff class housed at San Quentin and Folsom:

1. A prisoner shall be released from segregation upon his Minimum Eligible Release Date (MERD), if any, or at the expiration of twelve (12) months of consecutive confinement in segregation, whichever is shorter, unless before said MERD or before said period expires, he is afforded all the hearing rights that attend initial placement in segregation. To retain the prisoner in segregation, it must be found after a fair hearing that

(a) The prisoner has committed a disciplinary offense for which a MERD has been assigned, and the MERD has not yet been reached; or

(b) Release of the prisoner would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct; or

(c) The prisoner has requested voluntarily continued retention in segregation.

2. The identity of any person providing information cited in support of placement or retention of a prisoner in segregation may be withheld at the hearing only if disclosure would endanger the safety of the source or institutional security. In any instance where the identity of the source is withheld, the prisoner shall not be placed or retained in segregation in the absence of a written statement, available to the prisoner, setting forth an evaluation of the reliability of the source and a statement of the reasons why the identity of the source is not disclosed.

3. A prisoner shall not be placed or retained in segregation on the basis of undisclosed information.

C.

No prisoner assigned to segregation shall be denied the opportunity to participate in a work, educational, or vocational training assignment for which sentence credit may be earned in accordance with California law unless it is first determined, in accordance with such law, that the prisoner has committed an act of misconduct which could be prosecuted as a felony or misdemeanor or which is defined by regulations of the California Director of Corrections as a serious disciplinary offense. Upon such a determination, the prisoner may be denied the opportunity to participate only for the term fixed by California law. See Cal. Penal Code § 2932(a). In unusual cases, the prisoner may be denied the opportunity to participate for additional six (6) month periods upon the determination of the Director of Corrections, reached in accordance with California law, that no credit qualifying assignment may be provided to the prisoner without creating a substantial risk of physical harm to staff or other inmates.

Prisoners assigned to segregation solely at their own request shall be permitted the opportunity to participate in credit qualifying assignments.

IV

A.

Pursuant to Fed.R.Civ.P. 53, the Court will appoint a Special Master (referred to herein as "Monitor") to monitor the progress of defendants in carrying out the provisions of this Permanent Injunction. Among the duties of the Monitor shall be to inspect each facility affected by this Injunction, to report to the Court from time to time concerning the state of compliance with this Permanent Injunction and the state of conditions of confinement in segregation at San Quentin and Folsom, and to advise the Court concerning any modifications to this Permanent Injunction that may appear necessary or that may be requested by a party. Defendants shall honor all requests by the Monitor for admission into any part of any facility affected by this Permanent Injunction. Defendants shall likewise honor all requests by the Monitor for the production of documents relevant to the state of compliance with this Injunction or the state of conditions of confinement in segregation. The duties of the Monitor shall continue until such time as he may be relieved by the Court or until the Court may adopt the Monitor's written report that defendants are in full compliance with the Permanent Injunction and that conditions of confinement in segregation units at San Quentin and Folsom do not violate the Constitution. Should the Court relieve the Monitor of his duties, the Court shall have power to appoint a successor Monitor. The period of time from the date of this Permanent Injunction to the date of the Monitor's certification shall be known as the "Interim Period."

B.

For the duration of the Interim Period, the following additional procedures set forth in this Part IV shall be followed in connection with the placement and retention of prisoners in segregation:

1. A prisoner may be placed in segregation only as follows:

(a) The prisoner has committed a disciplinary offense sufficiently serious to warrant punishment by confinement for a fixed term in segregation, and the term fixed is reasonable; or

(b) Continued presence of the prisoner in the general population would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct; or

(c) The prisoner has requested segregation for his own protection; or

(d) The prisoner is newly arrived at the prison and more information is needed to determine whether the prisoner may be incompatible with any element of the general prison population. No prisoner shall be involuntarily segregated for this reason for more than ten (10) days.

C.

A prisoner may be retained in segregation only for a reason listed in Part III(B)(1) of this Permanent Injunction.

D.

Any prisoner assigned to segregation as of the date of this Permanent Injunction shall be entitled to request release from segregation on the ground that there is no sufficient basis for retaining him in segregation in accordance with Part IV(C). A prisoner may submit a written statement of reasons in support of such a request. Such requests shall be considered initially by defendants or their designate, who shall determine whether to release the prisoner from segregation. If the prisoner is not released from segregation, within 21 days after the date of the request, he shall be entitled to request review by the Monitor of the decision to retain him in segregation.

Any prisoner placed in segregation during the Interim Period shall be entitled to request review by the Monitor of the decision to place him in segregation. The scope of such review shall include, but is not limited to, the adequacy of compliance with Part III(A) of this Injunction.

Any prisoner retained in segregation on the basis of the finding described in Part III(B)(1) of this Injunction shall be entitled to request review by the Monitor of the decision to retain him in segregation. The scope of such review shall include, but is not limited to, the adequacy of compliance with Part III(B) of this Injunction.

Upon a proper request for review by the Monitor pursuant to this Part of the Injunction, defendants shall immediately forward to the Monitor (1) the prisoner's request for review; (2) any written statement by the prisoner in support of his request; (3) any statement by the defendants or their designate of reasons in support of the decision to place or retain the prisoner in segregation;

(4) copies of all documents and all testimony, if transcribed, relied upon by defendants in support of the decision to place or retain the prisoner in segregation; and (5) a summary of the proceedings, if any, conducted by defendants in connection with the decision to place or retain the inmate in segregation.

Following review of the materials forwarded, the Monitor may in his discretion convene a hearing or order such further proceedings as he may deem appropriate. Defendants shall provide suitable facilities for the conduct of any hearing ordered, and shall produce such witnesses and/or evidence at such time and place as the Monitor may direct. If the Monitor concludes, on the basis of all evidence submitted, that the prisoner was placed or retained in segregation in violation of any provision of this Permanent Injunction, he may order the prisoner released from segregation, or he may order defendants to conduct further proceedings if required by this Injunction.

Any decision of the Monitor upholding placement or retention of a prisoner in segregation shall be conclusive and subject to no further review.

Any final decision of the Monitor requiring release of a prisoner from segregation shall be set forth in writing and shall be subject to review by the Court upon motion of defendants. Defendants may file with the Court a memorandum in support of their request. Unless the Court vacates the decision of the Monitor within thirty (30) days following the filing of defendants' motion, the decision of the Monitor shall be final.

Defendants shall provide to each plaintiff a notice, in a form approved by the Monitor, of the rights of plaintiffs under this Part of the Permanent Injunction.

V

Defendants shall provide a copy of this Permanent Injunction to each member of the plaintiff class at San Quentin and Folsom within ten days of the date of this Injunction, and shall post a copy in each segregation unit where it may readily be seen by class members. Defendants shall also provide a copy of this Permanent Injunction to every employee of the California Department of Corrections at San Quentin and/or Folsom.

No person who has notice of this Permanent Injunction shall fail to comply with the letter and spirit hereof nor shall any person subvert the letter or spirit hereof by any sham, indirection, or other artifice.

VII

The Court retains jurisdiction to modify this Injunction at any time and from time to time on its own motion or upon the motion of any party in the interest of effectuating its intendments or in the interest of furthering the ends of justice under all applicable law.

(Filed December 7, 1984)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT, et al., Plaintiffs, vs. DANIEL J. McCARTHY, et al., Defendants.	Nos. 73-1422, SAW WRITTEN ORDER CONFIRMING MINUTE ORDER DENYING MOTION FOR NEW TRIAL

On November 29, 1984, after full consideration and in open court with counsel for all parties present, the Court directed the courtroom deputy clerk to enter a minute order denying (1) defendants' motion for a new trial, (2) defendants' motions to alter or amend judgment, and (3) defendants' motions for stays pending appeal. That order was that day duly filed and docketed and is hereby confirmed.

/s/ Stanley A. Weigel

Judge

[Filed July 17, 1985]
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH TOUSSAINT,) Nos. 84-2833,
et al.,) 85-1878
Plaintiffs-Appellants,) DC# CV 73-1422-
vs.) SAW
DANIEL McCARTHY, et) Northern
al.,) California
Defendants-Appellees.)
)

JOSEPH TOUSSAINT, et) No. 85-1507
al.,)
Plaintiffs-Appellants,) DC # CV 73-1422-
vs.) - SAW
DANIEL McCARTHY, et) Northern
al.,) California
Defendants-Appellees.)
) ORDER

Before: ANDERSON and FARRIS, Circuit Judges

Appellants' motion for stay pending appeal of the district court's order of June 13, 1985, insofar as it affirms the monitor's order of April 11, 1985, is granted.

This appeal will be expedited and calendared for oral argument at the earliest possible date.

[Filed June 27, 1985]
UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TOUSSAINT, et al.,

Plaintiffs,

vs.

McCARTHY, et at.,

Defendants.

Nos. 73-1422,
SAW

ORDER

The Court has considered all of defendants' papers today filed (variously referred to as motions or requests or applications). Defendants rely solely upon the case of Superintendent Mass. Correctional Institution v. Hill, 53 U.S.L.W. 4778 (June 17, 1985) decided ten days ago and carefully considered by this Court. That decision is inapplicable because the sole relevant question therein related to denial of good time credits. In the case before this Court, that interest is not the only interest involved and, indeed, is the least important. Here, the inmate's interest in avoiding unconstitutional conditions of confinement, as well as the Court's interest in enforcing its orders in the light of defendants' failure of compliance heretofore, are also at stake.

The Court having carefully considered the matter, and other good cause appearing,

IT IS HEREBY ORDERED as follows:

1. The request for an Order Shortening Time is denied.

2. The application or motion for reconsideration and vacation is denied.

3. The request for a stay and/or stays is denied.

Although the Court is satisfied that the motion for reconsideration and vacation is without merit, defendants may, if they are so minded, renew the motion in compliance with the applicable time standards delineated in the Local Rules of this Court.

Date: June 27, 1985

/s/ Stanley A. Weigel

Judge

[Filed June 13, 1985]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TOUSSAINT, et al.,
Plaintiffs,
vs.
McCARTHY, et al.,
Defendants.

Nos. 73-1422,
SAW

ORDER

ORDER

On April 11, 1985, the Monitor ordered that fourteen (14) prisoners be released from administrative segregation at San Quentin and Folsom prisons. Defendants now move the Court to vacate the Monitor's order with respect to eleven (11) of those prisoners.

The Court, having fully considered the arguments of counsel, both oral and written, and having thoroughly reviewed the records of the prisoners ordered released, finds that, except as to inmate Richard Richard, CDC No. B-70359, the Monitor's Order is fully supported by each prisoner's record.

IT IS HEREBY ORDERED that the Monitor's Order of April 11, 1985, releasing inmate Richard Richard, CDC NO. B-70359, from segregation is hereby vacated. In all other respects, defendants' motion to vacate the Monitor's Order of April 11, 1985 is hereby denied.

Date: June 13, 1985.

/s/ Stanley A. Weigel
Judge

SUPREME COURT OF THE UNITED STATES
No. A889

DANIEL J. McCARTHY, DIRECTOR,
CALIFORNIA DEPARTMENT OF
CORRECTIONS, ET AL.,

Applicants,

v.

VALENTINO ALTAMIRANO

O R D E R

UPON FURTHER CONSIDERATION of the application of counsel for the applicants, the response filed thereto,

IT IS ORDERED that the temporary stay heretofore entered on May 24, 1985, be, and the same is hereby, vacated. The application for stay is, in all respects, denied.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 4th day of June, 1985.

(Filed May 22, 1985)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH TOUSSAINT, et al.,) Nos. 84-2833, 85-1507 and 85-1878
Plaintiffs-Appellees.)
vs.) DC# CV 73-1422-SAW Northern California
DANIEL McCARTHY, et al.)
Defendants-Appellants.) ORDER

Before: ALARCON and FERGUSON, Circuit Judges

The court's order of April 17, staying the Monitor's Sixth Review Memorandum and Order, as affirmed by the district court, is vacated.

Appellants' request for a stay pending appeal of the monitor's authority under Part IV.D. of the Permanent Injunction, insofar as it empowers the monitor to render final decisions respecting the placement, release, or retention of prisoners in segregation, is granted. In all other respects, appellants' request for a stay of the permanent injunction pending appeal is denied.

SUPREME COURT OF THE UNITED STATES
No. A-889

DANIEL J. McCARTHY, DIRECTOR,
CALIFORNIA DEPARTMENT OF
CORRECTIONS, ET AL.,
Applicants,
v.

VALENTINO ALTAMIRANO

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the order of the United States Court of Appeals for the Ninth Circuit, case Nos. 84-2833, 85-1507 and 85-1878, filed May 22, 1985, is stayed pending receipt of a response and further order of the undersigned or of the Court.

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 24th day of May, 1985.

[Filed April 23, 1985]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT, et al., Plaintiffs, vs. DANIEL J. McCARTHY, et al., Defendants.	Nos. 73-1422, SAW ORDER

ORDER

Until further order of the Court,

IT IS HEREBY ORDERED that the Monitor's Order, dated April 11, 1985, providing for the release of certain prisoners therein named from administrative segregation, is hereby stayed.

IT IS FURTHER HEREBY ORDERED that on June 13, 1985, at 2:15 pm., the Court will consider the motions of the parties relating to said releases ordered by the Monitor. All motions opposing the releases, with all supporting papers, shall be served and filed on or before May 6, 1985. All responses, with all supporting papers, shall be served and filed on or before May 15, 1985. All replies, if any, with all supporting papers, shall be served and filed on or before May 22, 1985.

Dated: April 23, 1985.

/s/ Stanley A. Weigel
Judge

[Filed April 18, 1985]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH TOUSSAINT, et al., Plaintiffs-Appellees, vs. DANIEL McCARTHY, et al., Defendants-Appellants.	Nos. 84-2833, 85-1507 DC# CV 73-1422-SAW Northern California
JOSEPH TOUSSAINT, et Plaintiffs-Appellees, vs. DANIEL McCARTHY, et al., Defendants-Appellants.	No. 85-1878 DC # CV 73-1422-SAW Northern California ORDER

Before: WRIGHT, Circuit Judge

Appellants' emergency motion for stay of the Monitor's Sixth Review Memorandum and Order, as affirmed by the District Court, is granted pending further order of the court.

The court sua sponte consolidates these appeals. Appellees shall file a supplemental response to Appellants' Emergency Motion for Stay of Judgment of Permanent Injunction Pending Appeal within 10 days hereof.

[FILED APRIL 11, 1985]

IN THE UNITED STATES DISTRICT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT, et al. Plaintiffs, vs. DANIEL J. McCARTHY, et al., Defendants	No. C 73-1422 SAW (Monitor) ORDER RELEASING PRISONERS FROM SEGREGATION

Each of the prisoners listed below has requested review by the Monitor of his continued assignment to segregation in accordance with Part IV.D of the Judgment of Permanent Injunction entered by the Court on October 18, 1984. See Toussaint v. McCarthy, 597 F.Supp. 1388, 1426 (N.D. Cal. 1984).

In connection with each request for review, the Monitor has carefully reviewed all documents forwarded by defendants in accordance with the injunction. The Monitor has considered testimony presented in hearings concerning each request, together with all testimony so far presented in other prisoner review hearings. The Monitor has also considered remarks made in the course of a February 14, 1985 panel discussion, and has reviewed memoranda submitted by both sides.

For the reasons stated in _In re Altamirano_, 6th Rev. Mem. at 4-6 (filed Mar. 18, 1985), the Monitor finds that there is no sufficient basis for retaining any of the below listed prisoners in segregation as a member of a prison gang. None of these prisoners has committed any documented act of gang-related misconduct within the past three years. _See_ _id_. at 7. Following careful review of all evidence submitted, the Monitor further finds that there is no other sufficient basis for retaining any of the listed prisoners in segregation. Accordingly,

IT IS HEREBY ORDERED that each of the following prisoners shall be released from segregation not later than May 1, 1985 unless, prior to that date, the Court should vacate this decision of the Monitor.

Prisoner	Prison	CDC Number
Barela, Daniel C.	FOL	B-28045
Castro, Anthony	SQ	C-03681
Elmore, Corwin B.	FOL	B-47467
Ferrel, Alejandro R.	FOL	B-34052
Gallegos, Hector S.	FOL	B-66431
Hayes, Michael	SQ	C-70159
Mendoza, Fred V.	SQ	B-83832
Miears, Daryl E.	SQ	C-26578
Pina, Daniel M.	FOL	C-15021
Ramos, Daniel	SQ	B-77508
Richard, Lewis	SQ	B-27964

Richard, Richard	SQ	B-70359
Shryock, Raymond M.	FOL	C-57475
Vasquez, Ralph	SQ	B-83212

The foregoing constitutes the final decision of the Monitor requiring release of each of the above listed prisoners from segregation.

Dated: April 11, 1985

MONITOR

[Filed March 25, 1985]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT, et al.,

Plaintiffs,

vs.

DANIEL J. McCARTHY, et al.,

Defendants.

Nos. 73-1422, SAW (Monitor)

MEMORANDUM AND ORDER DENYING REQUEST TO WITHDRAW SIXTH REVIEW MEMORANDUM AND ORDER

Defendants have requested the Monitor to withdraw the Sixth Review Memorandum and Order of the Monitor (Docket No. 1761, filed Mar. 18, 1985) (hereinafter referred to as "In re Altamirano"). The Monitor, having fully considered the concerns expressed by defendants, denies this request.

Defendants make their request because they desire to seek review by the

Court of In re Altamirano. Defendants point out that the Order Concerning Motions to Reject or Modify Any Report or Ruling of the Monitor (Docket No. 1651, filed Jan. 17, 1985) (hereinafter referred to as "Order of January 17") states that any party wishing to reject, modify, or object to "any report, ruling, decision, or other action of the Monitor" must follow the procedure delineated as to any report of the Monitor at page 4, lines 9 through 19 of the Order of Reference dated October 18, 1984. This procedure requires, among other things, that a party seeking to object before the Court to a report of the Monitor must show as a preliminary matter that an identical specific written objection was previously submitted to the Monitor. Consequently defendants suggest a possibility that no appeal from the decision in In re Altamirano may be taken until defendants have submitted, and the Monitor has ruled upon, specific written objections to the decision.

To ensure their right to Court review, defendants ask the Monitor to withdraw In re Altamirano. However, the Monitor is satisfied that defendants may now properly seek review of the In re Altamirano decision by the Court, and for that reason denies defendants' request.

The Judgment of Permanent Injunction in this case sets forth at page 12, lines 16 through 22 a specific procedure governing Court review of decisions of the Monitor requiring release of a prisoner from segregation. In re Altamirano is such a decision. See 6th Rev. Mem. at 11. The permanent injunction provides that a final decision of the Monitor requiring release of a prisoner from segregation "shall be subject to review by the Court upon motion of defendants." The Monitor finds no indication in either the Order of Reference or the Order of January 17 that the Court intended to alter or impose conditions upon this particular right to review. Rather, the evident intent of the Court in entering the Order of January 17 was to define the procedure governing review of reports, rulings, and other actions of the Monitor that are not the subject of review procedures specified in the Order of Reference or the Judgment of Permanent Injunction.

Moreover, even if the Order of January 17 should be construed to govern appeals from prisoner review decisions, withdrawal of the decision in In re Altamirano would be pointless. Prior to entry of the review memorandum, the

Monitor thoroughly considered numerous arguments, oral and written, made by defendants. See In re Altamirano, 6th Rev. Mem. at 1-2. Among the documents reviewed was one captioned Defendants' Reply to Proposed Findings and Order of the Monitor Re Prison Gangs (Docket No. 1755, filed Mar. 7, 1985). Another was captioned Defendants' Memorandum of Points and Authorities Re Placement of Prisoners in Segregation Against Their Will for Protection (Docket No. 1760, filed Mar. 15, 1985). These documents articulate defendants' position with respect to the issues involved in In re Altamirano. Renewed consideration of the same position by the Monitor is unnecessary.[1]

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[1] To guarantee defendants an
(Footnote Continued)

Defendants also request, in the alternative, that the Monitor alter the deadline of April 18, 1985 for release of Altamirano from segregation. See In re Altamirano, 6th Rev. Mem. at 11. Defendants note that in accordance with page 12, lines 20 through 22 of the Judgment of Permanent Injunction, the decision to release Altamirano may not become final for purposes of Court review until after April 18.

Defendants' request is denied. The Monitor finds the period of 31 days between March 18, when In re Altamirano was entered, and April 18 to be sufficient to allow defendants to seek

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(Footnote Continued)

opportunity to appeal, the Monitor will withdraw the Sixth Memorandum and Order and undertake reconsideration should the Court rule that because of the Order of January 17, review by the Court is now improper.

and obtain effective review by the Court. Any modification of the April 18 date rests with the discretion of the Court.

Accordingly,

IT IS HEREBY ORDERED that defendants' request for withdrawal or modification of the Sixth Review Memorandum and Order of the Monitor is denied.

Dated; March 25, 1985.

/s/ Robert R. Riggs
MONITOR

FOOTNOTE

1. To guarantee defendants an opportunity to appeal, the Monitor will withdraw the Sixth Memorandum and Order and undertake reconsideration should the Court rule that because of the Order of January 17, review by the Court is now improper.

[FILED MARCH 18, 1985]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT,)
et al.)
)
Plaintiffs,) No. C 73-1422 SAW
) (Monitor)
vs.)
) SIXTH REVIEW
DANIEL J. McCARTHY,) MEMORANDUM AND
et al.,) ORDER
)
Defendants)
)
)
In re VALENTINO)
ALTAMIRANO,)
CDC # B-64104)
)
Petitioner.)
)

I. INTRODUCTION

Petitioner Valentino Altamirano is a prisoner confined in segregation on October 18, 1984 at San Quentin State Prison.[1] On November 8, 1984, petitioner submitted to prison officials a request for release from segregation in accordance with Part IV.D of the Court's Judgment of Permanent Injunction. See Toussaint v. McCarthy, 597 F.Supp. 1388, 1426 (N.D. Cal. 1984). Petitioner was not released from segregation. On December 11, 1984, also pursuant to Part IV.D, petitioner requested review by the Monitor of the sufficiency of the basis for the decision to retain him in segregation.

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[1] As of that date, Altamirano had been continuously confined in segregation units of one kind or another for more than eight years, since April 17, 1976.

In connection with petitioner's request for review, the Monitor has carefully reviewed all documents forwarded by defendants in compliance with the injunction. The Monitor has considered testimony concerning petitioner's request presented in a hearing on February 6, 1985, together with all other testimony so far presented in prisoner review hearings before the Monitor. On February 14, 1985, a panel discussion was convened involving seven participants, all experts on the subject of prison gangs. The Monitor has considered the remarks made in the course of this discussion. The Monitor has also reviewed memoranda submitted by both sides concerning the significance of prison gangs, the use of confidential information, and the injunction's standards for placing and retaining prisoners in segregation.

The fundamental question to be decided is whether defendants have established a sufficient basis for retaining Altamirano in segregation pursuant to the standards prescribed by the injunction. Under the injunction, retention of a prisoner in segregation is permissible only if:

> (a) The prisoner has committed a disciplinary offense for which a MERD [Minimum Eligible Release Date] has been assigned, and the MERD has not yet been reached; or
>
> (b) Release of the prisoner would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct; or
>
> (c) The prisoner has requested voluntarily continued retention in segregation.

Toussaint v. McCarthy, 597 F.Supp. at 1424, 1426.

In a previous review memorandum, the Monitor acknowledged one legitimate ground for concluding that a prisoner's release from segregation would severely endanger the lives of inmates or staff: A recently demonstrated propensity for violence. In re Kent, 2d Rev. Mem. at 2 (filed Jan. 15, 1985). In that instance, the prisoner involved had been found guilty of four incidents of assault or possession of a deadly weapon within the past three years. Id.

In another previous review memorandum, the Monitor concluded that release of a prisoner may be considered to severely endanger the security of the institution when the prisoner has repeatedly engaged in aggressive behavior designed to coerce others to serve as unwilling partners in illicit sexual acts. In re Joslin, 3d Rev. Mem., at 4 (filed Jan. 21, 1985). In that instance, the coercive activities of the prisoner involved had been documented by a substantial number of reports received within the past two years. See id. at 4 & n. 1.

In another review memorandum, the Monitor acknowledged the propriety of retaining a prisoner in segregation for a period not exceeding ninety days following a serious disciplinary offense pending a determination as to the SHU (segregated housing) term to be imposed for the offense. In re Mora, 5th Rev. Mem. at 1-2 (filed Jan. 28, 1985).

Defendants do not rely on any of these acknowledged grounds in support of their decision to retain petitioner Altamirano in segregation. Instead, they cite another reason: their determination that petitioner is a member of a prison gang. In this memorandum, therefore, it is necessary to decide whether and under what circumstances association with a prison gang warrants the retention of a prisoner in segregation.

II. FINDINGS OF FACT

Based on the evidence presented, there is no question that prison gangs exist and that their activities hinder sound correctional management. Many gang activities, such as narcotics sales, are criminal in themselves. Most violate prison rules, and properly so. And prison gangs are often responsible for fatal stabbings and other premeditated acts of violence. For these reasons, the Monitor finds that prison officials are justified in maintaining that prisoners who carry on gang-related activities present a special threat to the safety of other inmates and staff and to the security of the institution, and in attempting to isolate such prisoners from the remainder of the prison population.

However, the decision of defendants to retain petitioner in segregation is not based on any recent gang-related activity conducted by petitioner.[2] It is based solely upon his status as an identified "member" of the prison gang known as "Nuestra Familia." The question squarely presented is this: Does prison gang "membership," in the absence of gang "activity," justify the assignment of a prisoner to segregation in accordance with the standards of the permanent injunction?

The Monitor, upon consideration of all the evidence, finds that the "gang membership" concept provides an inadequate basis for assessing the danger to others or to prison security presented by a particular prisoner.

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[2] The most recent instance of alleged gang activity documented in petitioner's file occurred on April 17, 1976, when petitioner stabbed another inmate at the Deuel Vocational Institute in Tracy.
(Footnote Continued)

Gang membership, to start with, is inherently virtually impossible to ascertain or discover with precision.[3] The gang's only tangible existence is in the minds of prisoners and prison officials. And it is quite unlikely that any two individuals would independently list the same set of persons as members of the group. "Membership" in a prison gang is much like "membership" in the

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(Footnote Continued)

This incident is considered by prison authorities to be a Nuestra Familia related "hit."

[3] Partly due to this problem, prison officials utilize an elaborate system of accounting for prison gang rosters in which they recognize, in addition to gang "members," gang "associates," "affiliates," and "wannabes" (prisoners who "want to be" members but have not yet established themselves as such). The present discussion relating to gang "members" applies equally to these lesser categorizations (which are also sometimes cited as a basis for placing or retaining a prisoner in segregation).

Communist Party: If it is a crime, it is a thought crime.[4] As a result, the attempt by prison authorities to identify and segregate gang "members" resembles a classic "witch hunt." A prisoner can be removed from the general prison population and locked up in segregation for years based on unrebuttable assertions that he secretly bears allegiance to a prison gang.

Second, even assuming that accurate methods for identifying gang "members" could be devised, the inquiry would still be unrewarding, because the term "gang member" has little meaning. That a prisoner is a "gang member" could be taken to mean, for example, that he is actively engaged in designing and executing schemes to intimidate other inmates and to monopolize illicit transactions within the prison. But the evidence is very clear that not all "gang members" engage in such behavior. A prisoner could also be a "gang member" if he has friends who engage in such activities, or even if he simply associates with a certain group of prisoners who stand by each other and lend mutual support in order better to brave the stresses of the maximum security prison world. Thus, even if a prisoner is a "gang member," it does not necessarily follow that he will perpetrate violence or engage in any other undesirable prison gang activity.[5]

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[4] In point of fact, prison gang "membership" does not violate any official prison rule.

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[5] In fact, there was some evidence to
(Footnote Continued)

It is true that some gang "members" can be identified as having conducted specific forbidden gang-related activities. However, another weakness of the gang member concept, as presently used, is that it fails to account for the possibility that a gang "member might cease to break prison rules and decide to abide by the rules. Under the current system, a gang "member" is retained in segregation indefinitely no matter how long his period of disciplinary-free behavior, because once identified as a "member," he is considered always to be a "member."

(Footnote Continued)

indicate that at least occasionally prisoners can use their perceived gang membership as a means for avoiding pressure to engage in violence or other prohibited activity.

Finally, the very act of labeling a prisoner as a "gang member" makes it more likely that he will become either a perpetrator or a target of gang-related activity. This is because the labeling of a prisoner as a gang member is perceived by other inmates to have significance. Once a prisoner is generally known as a gang member, the gang's enemies become his enemies. The gang's truly active constituents, too, can become his deadly enemies if he refuses to carry out gang-related assignments as ordered. Yet some prisoners manage to avoid yielding to such pressure and remain disciplinary-free even though labeled a gang member.

For all these reasons, the Monitor finds that a determination by prison authorities that a prisoner is a "gang member" does not constitute a sufficient basis for finding that the prisoner's presence in the general prison population would "severely endanger the lives of inmates" or "the security of the institution."

Instead, the focus should properly be placed upon illicit prison gang activities, not prison gang membership. If a prisoner is found guilty of aiding in or perpetrating such activities, severe punishment is justified. In most instances, the imposition of a lengthy SHU term would make it unnecessary to retain the prisoner in lockup for "administrative" reasons. *See* *Wright v. Enomoto*, 462 F.Supp. 397, 398 (N.D. Cal. 1976) (defining term "administrative" reasons), *aff'd*, 434 U.S. 1052 (1978)). Some situations may develop in which prison officials can properly retain a prisoner in segregation based on recent gang-related activities even though no SHU term is being served. But the Monitor is satisfied that even when a prisoner has engaged in impermissible gang-related activity, a three-year period free of all gang-related misconduct demonstrates a sufficient likelihood that the prisoner has ceased participating in such activity to require his release from the harsh regime or segregation at San Quentin or Folsom.

Accordingly, the Monitor will consider prison gang activity a proper basis for the "administrative" retention of a prisoner in segregation only when the prisoner has been found by prison authorities, following proceedings meeting all requirements of the Court's permanent injunction, to have perpetrated or aided at least one act of specific gang-related misconduct within the three years preceding the decision to retain him in segregation.[6/] In any instance where a prisoner has committed no gang-related misconduct within the past three years, the Monitor will not uphold the assignment of the prisoner to segregation on the basis that his association with a prison gang makes him a source of severe danger to other inmates or to institutional security.

Petitioner Altamirano has not been found guilty of a disciplinary infraction of any kind since August 21, 1981. Under the standard just stated, there is no sufficient basis for concluding that his release to general population would

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6/ Such misconduct could, of course, include participation in a gang-related conspiracy.

severely endanger other prisoners or institutional security.

Defendants also maintain that petitioner's retention in segregation is justified because petitioner's own life would be jeopardized were he released to the general population. Defendants say that because Altamirano is perceived by other prisoners to be a member of Nuestra Familia, members of rival gangs would attack him on sight even if he is no longer engaged in Nuestra Familia activities. To evaluate this argument requires an assessment of the circumstances in which, under the Court injunction, a prisoner may be retained in segregation against his will for his own protection.

The permanent injunction states that a prisoner may be retained in segregation if his release would "severely endanger" the lives of inmates. In the judgment of the Monitor, this permits prison authorities to retain involuntarily a prisoner in segregation if his life would be "severely endangered" by his release into the general prison population. However, the willingness of a mentally stable prisoner to enter the general prison population provides a strong indication that the prisoner's life would not be severely endangered. Prisoners in review hearings credibly testified that the entry of a prisoner into the general population at San Quentin or Folsom is always accompanied by an element of danger. Some also acknowledged that the danger can be heightened when the prisoner has been labeled as a gang member. But the same prisoners also stated that confinement in segregation is so difficult to endure that they would rather face these dangers than remain locked up in segregation for their own protection.

Witnesses called by defendants testified that prisoners who have been labeled as members of certain gangs, including Nuestra Familia, will invariably be assaulted upon entry into the general population at San Quentin or Folsom. But no statistics were offered to substantiate this assertion, nor, apparently, is any effort made to compile such statistics. Even if defendants are correct in suggesting that prisoners known as gang members face increased dangers, it is unjust to force these prisoners to remain in segregation for their own protection if they have committed no misconduct. To do so in effect sanctions intimidation by other prisoners. And even if the reason for the increased danger is past misconduct of the prisoner, it is cruel and unrealistic to force him to remain in segregation more than three years later if the prisoner does not himself feel unwilling to return to the general population.

For these reasons, the Monitor hereby rules that to retain a prisoner in segregation for his own protection, prison officials must find that the prisoner's life would be endangered upon release as a result of specific misconduct of the prisoner committed within the past three years.[7]

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[7] An example of a situation where such retention might be appropriate would be when the prisoner has executed a fatal assault upon a member of another race, and prison officials have reason to believe that prisoners of the victim's race would seek reprisal if the assailant

(Footnote Continued)

In accordance with this standard, petitioner Altamirano cannot be retained in segregation for his own protection. He has engaged in no misconduct within the past three years that would cause his life to be severely endangered were he housed on the mainline at San Quentin.

The final argument advanced by defendants for retaining petitioner in segregation is that his release would

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(Footnote Continued)

were released. Note that proof that the attack was gang-related would not be needed to sustain the decision to retain the prisoner in segregation in this situation.

Counsel for plaintiffs have suggested that prison authorities should also be permitted to retain a prisoner in segregation for a short period of time, not exceeding thirty days, in the face of a danger to the prisoner's life that prison authorities certify to constitute an exceptional circumstance" protective retention. The present review memorandum concerns only "protective" segregation placement or retention that lasts longer than thirty days.

severely endanger the lives of prison staff. There is no suggestion that Altamirano poses any particular risk of assaulting staff. Rather, the danger cited by defendants is strictly a function of the dangers previously discussed, particularly the danger that petitioner might be assaulted upon his return to the general population. In the event of any violence among prisoners, defendants say, there is a risk that prison staff acting to break up the altercation may be injured or killed. Consequently defendants maintain that petitioner's release would create an unacceptable risk of harm to prison staff.

The Monitor cannot accept this line of reasoning, because to do so would again sanction a form of intimidation by inmates. The day-to-day administration of a maximum security prison such as San Quentin or Folsom always carries with it the risk that prison staff may be required to intervene to halt a violent attack. California Department of Corrections staff members deserve commendation for the competent and professional manner in which they customarily respond to such incidents. The Monitor is confident that San Quentin and Folsom staff will continue to discharge these duties in a manner that will minimize the level of violence in the general populations of these prisons. Having found that no extraordinary danger of lethal violence among prisoners would be occasioned by Altamirano's release to the general population, the Monitor further finds that the lives of CDC staff would not be severely endangered by his release.

III. CONCLUSION

The Monitor concludes, on the basis of all evidence submitted, that petitioner Altamirano is presently retained in segregation in violation of Part IV.C of the Judgement of Permanent Injunction.[8] Accordingly,

IT IS HEREBY ORDERED that petitioner Valentino Altamirano shall be released from segregation not later than April 18, 1985, unless, prior to that date, the Court should vacate this decision of the Monitor.

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[8] It is not necessary to determine whether the injunction may have been violated in other respects as well, i.e., whether procedures required in conjunction with the retention of a prisoner in segregation were properly observed.

The foregoing constitutes the final decision of the Monitor requiring release of petitioner from segregation.

Dated: March 18, 1985

/s/ ROBERT R. RIGGS
ROBERT R. RIGGS
Monitor

[Argued and Submitted July 14, 1983.
Decided Jan. 5, 1984.]

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Joseph TOUSSAINT, et al.,
Plaintiffs-Appellees,

v.

Samuel YOCKEY, Acting Director of Corrections, Reginald Pulley, Warden, San Quentin Prison; Robert Rees, Superintendent, Deuel Vocational Institution, Alan Stagner, Superintendent, Correctional Training Facility (Soledad),
Defendants-Appellants.

Defendants.

Nos. 83-1678,
83-1775

Appeal from the United States District Court for the Northern District of California.

Before TRASK, and CANBY, Circuit Judges, and SOLOMON[*/], District Judge.

CANBY, Circuit Judge:

Plaintiffs are a class of approximately 2,000 prisoners confined in administrative segregation in four California State Prisons: Deuel Vocational Institution, Folsom Prison, San Quentin Prison, and Soledad Correctional Training Facility. Defendants are the wardens of the four prisons and the California Director of Corrections. Plaintiffs sought relief on two claims. In Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976), aff'd, 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978) ("Wright I"), a three-judge

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[*/] Honorable Gus J. Solomon, United States Senior District Judge for the District of Oregon sitting designation.

panel convened pursuant to 28 U.S.C. § 2281, now repealed, granted relief on the first claim. The court concluded that the due process clause of the fourteenth amendment required certain procedures before a prisoner could be placed in administrative segregation.

This appeal involves the second claim for relief, based on the eighth amendment's prohibition of cruel and unusual punishment. A prior preliminary injunction, issued on November 3, 1980, was vacated by this court in Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981) ("Wright II"). In Wright II we held that the district court erred in relying on a "totality of conditions" approach in analyzing the constitutionality of prison conditions.

On remand the district court entered detailed findings of fact and concluded that even when analyzed individually, many of the current conditions in administrative segregation at three of the institutions[1/] are probably unconstitutional. Determining that plaintiffs had demonstrated a probability of success on the merits and that the balance of hardships tipped sharply in their favor, the court entered a new preliminary injunction. Defendants challenge the district court's conclusions on several grounds, each of which will be discussed in turn. We affirm all of the preliminary injunction except the provision relating to food services.

1/ Folsom Prison was not included in the preliminary injunction at issue in this appeal.

I. Double Celling

[1] The district court found that prisoners who are confined in administrative segregation live in cells which in general are approximately six feet wide and eight to nine feet long. Each cell is furnished with a bed of some sort, a thin mattress, a pillow, a blanket, a coverless toilet and a sink. Each inmate is supplied a cardboard box in which to keep his personal belongings. shelf space is minimal or in some cases non-existent. Many of the cells have no windows.[2] The district court found that

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[2] Defendants argue that the district court erred by over-generalizing. They argue that fifteen separate confinement units are affected by the preliminary injunction but that the evidence of constitutional violations cited by the court in its findings of fact did not apply to all of the units. There is no merit to this argument. The court made

(Footnote Continued)

double celling exacerbated the already bad conditions existing in these cells and engendered violence, tension and psychiatric problems. It therefore concluded that the practice of double-celling inmates in the housing units challenged in this action could not withstand constitutional scrutiny. In its preliminary injunction the court prohibited involuntary double celling for more than thirty days in any twelve-month period. It also limited double celling to cells larger than fifty square feet, in which a second bed, cot or bunk is provided.

(Footnote Continued)

findings as to the conditions at all three prisons affected by the preliminary injunction. The court did not abuse its discretion by failing to string cite references to each of the units after each of its findings.

In Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), the Supreme Court held that in and of itself double-celling is not unconstitutional. The institution involved in Rhodes was described as "a top-flight, first-class facility." The cells averaged 63 square feet and contained a cabinet-type night stand, a cabinet, shelf and radio built into one of the walls, a wall-mounted sink with hot and cold running water and a toilet that the inmate could flush from inside the cell. All of the cells had a heating and air circulation vent near the ceiling and more than half of them had a window that the inmates could open and close. All cells used to house two inmates were supplied with two-tiered bunk beds.

As found by the district court, conditions in the units at issue in this case are very different. The facts already set forth make clear that the differences are substantial. One is particularly crucial. In Rhodes the district court found that there was no evidence that double celling caused greater violence. 452 U.S. at 343, 101 S.Ct. at 2397. In contrast, the district court in this case found that double-celling engenders violence, tension and psychiatric problems. That finding, along with others regarding cell conditions, clearly supports the double celling portion of the preliminary injunction. See id. at 349 n. 14, 101 S.Ct. at 2400 n. 14.[3]

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[3] We do not accept defendants' argument that, even if the district court's ban on double-celling is justified under current conditions, it is not justified under the conditions as

(Footnote Continued)

II. Exercise

[2] The district court found that many of the inmates were confined to their cells for as much as 23-1/2 hours a day. It concluded that the state's failure to provide sufficient exercise raised serious constitutional issues. In its preliminary injunction the court required the state to provide each prisoner with outdoor exercise. In Spain v. Procunier, 600 F.2d 189, 199-200 (9th Cir. 1979), we held that, on the facts presented, the denial of outdoor

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ordered by the court. That argument goes only to the district court's finding that the practice of double-celling exacerbated the already bad cell conditions. It says nothing about the court's finding that in and of itself double-celling in these cells engenders violence. Moreover, if in the future conditions are shown to have changed as a result of the district court's order, defendants can apply for a modification of this injunction.

exercise constituted cruel and unusual punishment. Several factors present in Spain combined to make outdoor exercise necessary. The prisoners were in continuous segregation, spending virtually all their time in their cells; their contact with other persons was minimal; they lived in an atmosphere of fear and apprehension; and they were confined under degrading conditions without affirmative programs of training or rehabilitation. Id. We deemed it important that the inmates in question were not temporarily in segregation: they had already been there over four years. Id. at 200.

Similar findings were made in this case. Although the length of confinement in segregation varies, almost 1,000 inmates have been assigned to administrative segregation for over one year. Given those findings, the district court did not err in concluding that the denial of outside exercise raised a substantial constitutional question and that plaintiffs would probably succeed on the merits of that issue.

Defendants argue that the district court erred in requiring them to afford exercise beyond that required by their own regulations without holding those regulations unconstitutional. The state regulation governing inmate exercise requires less exercise than the preliminary injunction and permits indoor exercise. Cal.Admin.Code Tit. 15 § 3343(h). Defendants' argument misses the point. The district court did not invalidate the state regulation; it merely held that, given the circumstances of this case, the denial of outdoor exercise was probably unconstitutional.

See Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981) (comparing Spain v. Procunier, which required outdoor exercise where prisoners were otherwise confined in small cells twenty-four hours a day, with Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980), which did not require outdoor exercise where prisoners had access to dayroom eighteen hours a day).

III. Food Service

[3] The preliminary injunction provides that: "The types and quantities of food served shall be the same as that which is provided for general population inmates except that a sack lunch is permitted. All food shall be prepared, stored, and served under sanitary conditions." Defendants correctly point out that there is no factual support in

the district court's findings for that portion of the injunction. That portion of the court's order is vacated.

IV. Procedural Safeguards

[4] The district court found that despite the court's holding in Wright I, plaintiffs continue to be arbitrarily placed and retained in segregated housing. The court found that defendants were violating the Wright I court's injunction in various ways. Specifically, the court found that:

> (1) prisoners continue to be placed in administrative segregation without any written reason for days well beyond the 48-hour requirement specified [in the state's] regulations[4]; (2) written

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[4] The regulation relied on was enacted
(Footnote Continued)

explanation for placement in administrative segregation is often vague and conclusory in terms; (3) counsel-substitute (staff assistant) to aid in the preparation of the prisoners cases is often denied, event when assistance is clearly warranted; (4) access to investigating employees is often denied to prisoners; (5) investigating reports may be adequate or not be received until after the hearing; and (6) explanations of reasons for the decision reached and references to the evidence in support of the decision are inadequate.

(Footnote Continued)

in response to the Wright I injunction. As was the case with the other procedural safeguards violated by defendants, the court found the forty-eight hour limit originated in the injunction.

The court also found that the hearings which were provided were defective in various respects:

(1) the ten-day time limitation within which the prisoner must have his hearing, as mandated by [state] regulations, is often disregarded;
(2) requests by inmates for witnesses are often denied without reason;
(3) confidential information may be admitted without a showing as to its reliability beyond conclusory representation by officials, and
(4) the prisoner may be involuntarily absent from the hearing or, as in one reported case, there may not even be a hearing.

In Part III of the injunction the district court imposed various procedural requirements to correct these practices. The court required every prisoner to be released from administrative segregation at the expiration of his minimum release date or twelve months of confinement, whichever is shorter, unless defendants were able to establish the prisoner's dangerousness at a hearing. The court specified the type of evidence which would be admissible at such a hearing as well as the criteria to be applied in determining whether to retain a prisoner in segregation.[5]

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[5] Part III of the injunction provides in part:

> 1. A prisoner shall be released from administrative segregation in a security housing unit at the expiration of his Minimum Eligible Release Date or at the expiration of twelve (1) months of consecutive confinement in security housing units, whichever is shorter, unless before said period expires, he is afforded all the hearing rights that attend a prisoner's initial placement in administrative segregation and defendants show at such hearing, on the

(Footnote Continued)

The remedy ordered in Part III does not, strictly speaking, correspond in all respects with the violations of the Wright I court's injunction found by the district court here. The court imposed a

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(Footnote Continued)

basis of the prisoner's behavior, that his release would severely endanger the lives of inmates or staff or the security of the institution. Such behavior shall be factually documented or based on reliable information as set forth in this section . . . . A prisoner shall not be involuntarily retained in any other administrative segregation unit unless, before the expiration of twelve (12) months of consecutive confinement, he is afforded all the hearing rights that attend a prisoner's initial placement in administrative segregation and unless at this hearing defendants show that release of the prisoner from segregation would endanger the prisoner's own safety or the safety of others; or that realease would jeopardize the integrity of an investigation into suspected criminal activity or serious misconduct. If the decision is based, in whole or in part, on gang membership, membership must be proven by reasonably convincing evidence of present and active allegiance to a gang.

hearing twelve months down the line to remedy an arbitrary initial decision to segregate a prisoner. Part III does, however, serve as a readily enforceable check on defendants' power to violate the earlier injunction. The district court's order was a valid exercise of that court's power to effectuate the prior order of the three judge court in Wright I.[6/] In fashioning a remedy for

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[6/] Because we hold part III of the injunction to be a valid exercise of the court's power to enforce a previously issued injunction, we need not address the court's independent conclusion that defendants' practices violate both the eighth and fourteenth amendments. We note, however, that in and of itself, misclassification is not a violation of the eighth amendment. Hoptowit v. Ray, 682 F.2d 1237, 1256 (9th Cir. 1982). Even an indeterminate sentence to punitive isolation does not without more constitute cruel and unusual punishment. Hutto v. Finney, 437 U.S. 678, at 686, 98 S.Ct. 2565, at 2571, 57 L.Ed.2d 522 (1978); Gibson v. Lynch, 652 F.2d 348,

(Footnote Continued)

those violations the district court had

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352 (3d Cir. 1981), cert. denied, ____ U.S. ______, 103 S.Ct. 3123, 77 L.Ed.2d 1375 (1983).

Moreover, Hewitt v. Helms, ____ U.S. _____, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) casts some doubt on the court's conclusion that defendants' practices violate the fourteenth amendment. In Hewitt the court held that an informal, non-adversary evidentiary review is sufficient to support an inmate's placement in administrative confinement. Moreover, the court acknowledged the prison administrators' need to base their decisions on generalized information.

> In the volatile atmosphere of a prison, an inmate may easily constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committeed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, . . . turns largely on "purely subjective evaluations and on predictions of future behavior, . . ."

Id. at ____, 103 S.Ct. at 873 (quoting Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981)). In passing on plaintiffs' request for a permanent

(Footnote Continued)

the authority to go beyond earlier measures and enter a comprehensive order to insure against the risk of continued non-compliance. Hutto v. Finney, 437 U.S. 678, 687 & n. 9, 98 S.Ct. 2565, 2571 & n. 9, 57 L.Ed.2d 522 (1978); Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982)[7]

(Footnote Continued)

injunction the district court may wish to reconsider its evaluation of plaintiffs' procedural claims and, if necessary, decide whether the evidence continues to warrant imposition of the procedural requirements adopted to insure compliance with the Wright I court's injunction.

[7] The issue before the district court was simply whether the Wright I order had been violated. Thus, it was not necessary to reconvene a three judge court. See Commission v. Brashear Lines, 312 U.S. 621, 625, 61 S.Ct. 784, 786, 85 L.Ed. 1083 (1941). Hamilton v. Nakai, 453 F.2d 152, 160-61, (9th Cir.), cert. denied, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972).

V. Abstention

Defendants argue that the district court should have abstained from exercising jurisdiction in this case. In Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980), cert. denied, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982), we vacated a district court judgment because the court exercised jurisdiction over an action challenging conditions at Central Juvenile Hall in Los Angeles.

In Manney we concluded that the three exceptional circumstances required for application of the Pullman doctrine (Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)) were present. The complaint touched on a sensitive area of social policy into which the federal courts do not lightly intrude. In addition to alleging federal constitutional violations, the complaint asserted that the conditions complained of violated two unusual state statutes which required the state to provide "custody, care, and discipline as nearly as possible equivalent to that which should have been given by [the juvenile's] parents." Cal.Welf. & Inst.Code § 202(a). The detention center was to "be conducted in all respects as nearly like a home as possible" Id. at § 851. Because we were uncertain how the California courts would construe these provisions, we decided to postpone constitutional adjudication, pending state decision.

[5,6] No such unusual statutes are involved in this case. Although the district court did discuss several state law provisions, the rights claimed to have been violated are plainly federal in origin and nature. The fact that state

law is also implicated does not require the district court to abstain. See Ramos v. Lamm, 639 F.2d 559, 564 & n. 5 (10th Cir. 1980), cert. denied, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239 (1981). The decision whether to abstain "involves a 'discretionary exercise of a court's equity power,' the propriety of which [must] be determined on a case-by-case basis." Manney, 654 F.2d at 1284 (quoting Baggett v. Bullitt, 377 U.S. 360, 375, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377 (1964)). Abstention is not favored in section 1983 cases. Canton v. Spokane School district No. 81, 498 F.2d 840, 845-46 (9th Cir. 1974). The district court did not err in refusing to abstain here.

VI. Pendent Jurisdiction

[7] Defendants argue that the district court erroneously exercised pendent jurisdiction as an excuse to broaden the scope of its review beyond that permissible under the eighth or fourteenth amendments. Noting that many of the conclusions of law track state law provisions, defendants argue that the court used pendent jurisdiction as a means to return to a "totality of conditions" approach and assume control of the prisons.

We disagree. Although the district court did rely in part on state law provisions, it based its conclusions of law on federal constitutional standards. As we directed in Wright II, 642 F.2d at 1132-33, the court simply relied on state law provisions, as well as expert opinions and professional standards, as aids in determining whether contemporary standards of decency had been met. See, e.g., Ramos, 639 F.2d at 567 n. 10. The court did not apply a "totality of conditions" approach. It considered the separate conditions of confinement and found that they violated the eighth amendments proscription of cruel and unusual punishment. In some cases the court necessarily took into account the effect of other conditions on the condition under consideration. Conditions of "confinement [do] not exist in isolation; [a] court order must consider the effect of each condition in the context of the prison environment, especially when the ill effects of particular conditions are exacerbated by other related conditions." Hoptowit, 682 F.2d at 1247. Finally, the district court carefully considered the impact of its order on security conditions, as well as the cost of carrying the order out. Its findings on those points are not clearly erroneous.

CONCLUSION

The district court did not abuse its discretion in concluding that the conditions it found to exist at the institutions affected by its preliminary injunction were of doubtful constitutionality, that the plaintiffs would probably succeed on the merits, and that the balance of hardships tipped sharply in their favor. However, the district court failed to enter findings to support its order regarding food service. We, therefore, AFFIRM all but the food service portion of the preliminary injunction.[8]

AFFIRMED IN PART AND VACATED IN PART.

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[8] On May 27, 1983, defendants filed a motion to strike the brief for amici curiae, the Bar association of San Francisco and the San Francisco's Lawyer's Committee for Urban Affairs. That motion is denied.

[Argued and Submitted January 14, 1983.]

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

Joseph TOUSSAINT, et al., Plaintiffs,	No. C-73- 1422-SAW
v.	
Ruth RUSHEN, et al., Defendants	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON GRANTING PRELIMINARY INJUNCTION FOLLOWING REMAND FROM CIRCUIT COURT

WEIGEL, District Judge.

The following Findings of Fact and Conclusions of Law, as well as the Preliminary Injunction to which they relate, are predicated upon the decision in Wright v. Rushen (9th Cir. 1981) 642 F.2d 1129, which remanded this case to this Court. The Findings and conclusions accordingly have been prepared in the light of careful consideration of (1) the entire record, of (2) the written and oral presentation of counsel for the parties including, particularly, Findings and Conclusions proposed by plaintiffs' and defendants' "Response to Proposed Preliminary Injunction, Findings of Fact and Conclusions of Law and Supplemental Opposition to Motion for Preliminary Injunction," of (3) meticulous review with counsel for all parties of the Findings and Conclusions proposed by plaintiffs, of (4) all decisions, statutes and regulations referred to by the parties and of (5) this Court's supplemental research.

It should be noted that a number of the provisions of the preliminary injunction do no more than to order defendants to comply with valid obligations imposed upon them by

California state law including regulations of defendants' own making. It should also be noted that defendants appear to concede the appropriateness of a number of the injunctive provisions if the facts and law are as this Court has found them. See, for example, defendants' "Response to Proposed Preliminary Injunction, Findings of Fact and Conclusions of Law and Supplemental Opposition to Motion for Preliminary Injunction" at pages 32 and 33.

Finally, by way of preliminary statement, this Court has, throughout, given full weight to evidence showing the heavy burdens placed on custodial authorities--especially in regard to handling those portions of the prison population composed of prisoners who are dangerous and violent. Such prisoners pose serious threats to each other, to other prisoners and to the custodial authorities. This Court has also given full weight to, and agrees with, the cases making it clear that prisoners, regardless of whether violent or dangerous, are not entitled to be pampered. This Court has also recognized throughout that it is not its business to run prisons. It has also recognized the heavy financial burdens involved in the maintenance and operation of prisons.

It is equally true that the foregoing considerations do not permit this Court or any court to condone disregard of Constitutional rights guaranteed even to persons who are prisoners. Any such disregard weakens the very essence of law and order in a Republic founded upon and governed by a constitution binding alike upon those who govern and those who are governed. There is no license anywhere in the laws of the United States to deprive prisoners of their rights under the Constitution of the United States.

Plaintiffs' motion for a preliminary injunction involves the second phase of Wright v. Enomoto (N.D.Cal. 1976) 462 F.supp. 397, aff'd , (1978) 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (hereinafter Wright I), a class action. Plaintiffs' class was certified on February 25, 1976. It consists of all prisoners confined or subject to confinement in administrative segregation at four California state prisons--California state prison at San Quentin, Deuel Vocational Institution at Tracy, Correctional Training Facility at Soledad, and California State Prison at

Folsom[1] Defendants are the Director of the California Department of Corrections (CDC) and the wardens and superintendents of the above-named institutions.

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[1] "Administrative segregation" means housing of inmates in segregation units as defined in the Order Determining that Action is Maintainable as a Class Action entered on February 25, 1976. Specifically, that Order defines these segregation units as "any of the maximum security, minimum privilege, segregated housing units in San Quentin Prison, Folsom Prison, the Correctional Training Facility ("Soledad") and the Deuel Vocational Institution ("DVI"), including without limitation, those housing units presently known as "B"-Section, the North Segregation Unit (formerly "Death Row") and the Adjustment Center at San Quentin; the Security Housing Unit and/or "IV-A" at Folsom; "O"-Wing, "S"-Wing, and "Y"-Wing at Soledad; "K"-Wing, "L"-Wing (or the adjustment Center"), East Hall and West Hall at DVI; and/or any other similar units now or hereafter used." In the intervening years, some of the units named in the Order no longer function as segregation units. The units currently n existence covered by these Findings of Fact, and Conclusions of Law, and Preliminary Injunction include without limitation, those housing units presently know as Security Housing Unit No. 1, Security HOusing Unit No. 2, Security Housing Unit No. 3, North Block (Management Control Unit and North Seg.), "D"-Section (Administrative Segregation) and "B"-Section at San Quentin; Security

(Footnote Continued)

In granting plaintiffs relief on their first claim, as affirmed in Wright I, supra, this Court held that principles of due process require that before an inmate is placed in administrative segregation, he must be afforded prompt written notice of the reasons for his confinement, an opportunity to prepare a defense, a fair and expeditious hearing at which to present evidence, representation by a

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(Footnote Continued)

Housing Unit (K-Wing), mangement control Unit (L-Wing), West Hall and East Hall at DVI; and/or any other similar units now or hereafter used.

Folsom Prison is not included in this motion because plaintiffs elected not to present evidence at this time relating to this institution.

counsel-substitute when appropriate, and a written decision by the hearing panel.

In July of 1980, plaintiffs moved for a preliminary injunction on their second claim for relief, which challenged (under the Eighth Amendment of the United States Constitution and Article I, section 17, of the California Constitution) the conditions of confinement in the administrative segregation units at defendants' institutions. A preliminary injunction issued on November 3, 1980.

The action is now before this Court by remand of the United States Court of Appeals for the Ninth Circuit, following its decision of March 13, 1981 vacating the November 3, 1980 preliminary injunction. Wright v. Rushen, supra, 642 F.2d 1129 (hereinafter Wright II). The Court of Appeals concluded that this

Court had abused its discretion because it "did not apply the proper legal standards assessing the plaintiffs' probability of ultimate success on the merits . . .," (id., at 1130), in that this Court "erred in its use of the 'totality of conditions' approach" (id., at 1132) in assessing the constitutionality of the conditions of confinement.

In its decision, the Ninth Circuit rejected the "totality of conditions" approach in favor of one that examines separately "each challenged condition of confinement, such as the adequacy of the quarters, food, medical care, etc., and determine whether that condition is compatible with 'the evolving standards of decency that mark the progress of a maturing society'" (id., at 1133).

Although the Court of Appeals recognized that a district court "may properly allow some margin of error when correcting violations" (id., at 1134), it further declared that judicial relief should be no more extensive than necessary to eliminate proven violations. The Court of Appeals also noted that "it must be made evident to a reviewing court that the district court did in fact focus on the impact of its remedies, even when cast only in the form of a preliminary injunction, on prison security and the resources of the state" (ibid.). The Court of Appeals recognized, however, that "each condition of confinement does not exist in isolation; the court must consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions" (id., at 1133).

The case was thus remanded back to this Court for further proceedings.

In response to the Ninth Circuit's order, plaintiffs have renewed their motion for a preliminary injunction, again challenging many of the conditions of confinement in administrative segregation as violating the Eighth Amendment of the United States Constitution and Article i, section 17 of the California Constitution. In support of their motion, plaintiffs have resubmitted the evidence presented to this Court in connection with their original motion. Specifically, this evidence consists of: (1) twenty-eight declarations under penalty of perjury from inmates confined in administrative segregation at San Quentin, Deuel

Vocational Institution, and Soledad; (2) depositions of defendant Ruth Rushen, California Department of Corrections director, and defendant George Sumner, former warden at San Quentin; (3) photographs of a number of the administrative segregation units; (4) declarations under penalty of perjury from psychiatrists reporting upon the mental and emotional impact of existing conditions upon prisoners; (5) extracts from the case files of various inmates; (6) declarations under penalty of perjury from several of plaintiffs' co-counsel; (7) a State Bar report on the California prison system in 1979; and (8) twenty-three declarations under penalty of perjury, primarily from inmates, filed in connection with Plaintiffs' Opposition to defendants Motion for Partial Summary Judgment as to San Quentin, Deuel

Vocational Institution, and Soledad. In addition, plaintiffs have submitted (in connection with their Motion for Preliminary Injunction Following Remand from Circuit Court) declarations under penalty of perjury from Arnold Pontesso (a former federal penitentiary warden, a former director of the Department of Corrections for the State of Oklahoma and currently a criminal justice consultant), from psychologist Craig Haney (a specialist on the effects of institutional environments and a criminal justice consultant), from twenty-eight inmates and from plaintiffs' co-counsel. Defendants have submitted numerous opposition photographs and declarations, consisting largely of unsubstantiated assertions and hearsay both before the entry of the Court's initial preliminary injunction and in response to plaintiffs'

Motion for Preliminary Injunction Following Remand from Circuit Court.

Plaintiffs also moved and were granted leave to amend their complaint to assert pendent state law claims under state statutes and regulations.

Many of the allegations in plaintiffs' declarations are either admitted or undisputed by defendants.[2/] Based upon a review of all of the submitted evidence, and upon application of the Eighth Amendment standards articulated by the Ninth Circuit, as well

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2/ While this Court elects not to grant plaintiffs' motion to strike many of defendants' declarations for failure to comply with Rule 220-8, Local Rules, Northern District of California and Rule 56(e), Federal Rules of Civil Procedure, the Court does not that the deficiencies of these declarations undercut substantially the weight of their evidence, particularly with respect to the balance of hardships.

as their pendent state claims, plaintiffs have demonstrated both (1) "a combination of probable success on the merits" and (2) "that serious questions are raised and the balance of hardships tips sharply in [plaintiffs'] favor" (Wright II, supra, 642 F.2d at 1132). This is so as to each of the conditions of confinement discussed below, analyzed on a condition-by-condition basis. The Court's conclusion that current conditions in administrative segregation raise serious doubts as to their constitutionality is reinforced when, as the Ninth Circuit mandated, "the court . . . consider[s] the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions" (Wright II, supra, 642 F.2d at 1133).

Plaintiffs' showing entitled them to preliminary injunctive relief.

I.

FINDINGS OF FACT

1. Placement in administrative segregation at defendants' institutions affects a substantial number of prisoners. In San Quentin, approximately 700 prisoners, or one-fourth of the total prison population, are confined in administrative segregation (First Sumner Dep., p. 6:3-10). In Soledad, approximately 600 prisoners, or one-fifth of the total inmate population, are housed in administrative segregation units (Pl.Ex. C, Cal. State Bar Rpt., p. 23). Over 480 of the approximately 1,350 inmates at the Deuel Vocational Institution are housed in administrative segregation (Smith Decl., Def. Ex. B,

p. 1:27-30, Defendants' Motion for Partial Summary Judgment as to Deuel Vocational Institution). Placement of such large numbers of prisoners in administrative segregation is unheard of in any other prison system in this country and unnecessary to maintain security or for any other valid correctional purpose (First Pontesso Decl., p. 3, ¶6).[3/]

[3/] Citation to declaratons will be by the last name of the declarant only unless two declarants have the same last name. Where more than one declaration was filed by the same individual, the citaion will include the date in which the particular declaration was executed. Additionally, the following citations will be utilized: the deposition of Ruth Rushen will be referred to as "Rushen Dep."; the deposition of George Sumner taken in connection with this case will be referred to as "First Sumner Dep."' the deposition of George Sumner taken in connection with Thompson v. Enomoto, 542 F.Supp. 768 (N.D.Cal. 1982), a related civil rights action pending in

(Footnote Continued)

2. Many of the inmates housed in administrative segregation are placed there arbitrarily and without procedural protections. Once prisoners are placed in administration segregation, they may be so confined for an indefinite

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(Footnote Continued)

this district will be referred to as "Second Sumner Dep."; the declaration of Arnold Pontesso, dated April 14, 1981, and filed in connection with Plaintiffs' Motion for Preliminary Injunction Following Remand, will be referred to as "First Pontesso Decl."' the second declaration of Arnold Pontesso, dated May 12, 1981, filed in connection with Plaintiffs' Motion for Preliminary Injunction Following Remand, will be referred to as "Second Pontesso Decl."; the declaration of Dr. Terry A. Kupers, Plaintiffs' Exhibit F, filed in connection with plaintiffs' initial Motion for Preliminary Injunction, will be referred to as "First Kupers Decl."' the declartaion of Dr. Terry A. Kupers, filed in response to Defendants' Opposition to Motion for Preliminary Injunction, will be referred to as "Second Kupers Decl.,"' the supplemental declaration of Henry A. Tabash, executed November 18, 1981, will be referred to as "Tabash Supp. Decl."

duration, many for over two years (see Arbitrary Placement, Retention, and Length of Term in Administrative Segregation, infra). The capricious fashion by which many prisoners are initially placed in administrative segregation and retained there for prolonged duration only intensifies the debilitating effects of the conditions of their confinement.[4]

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[4] "In my professional experience, indeterminately confining a prisoner under the conditions I observed at the CDC segregation units is contrary to any sound penological goal. Further, the conditions in which prisoners are housed in long term lock-up are extraordinary. The conditions I observed in these units would probably render most inmates so-confined debilitated and worse off, mentally and physically, when they are released from segregation than when they first entered lock-up. A prisoner on the mainline may be able to live in a cell that is 48 square feet in dimension without serious harmful effect. A prisoner in long-term lock-up cannot

(Footnote Continued)

Physical Conditions--Living Area

Double-Celling

3. Prisoners who are confined in administrative segregation live in cells

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(Footnote Continued)

without significant harmful effect. Double-celling in the lock-up context goes beyond the pale. Denila of contact and family visits can only be assessed in the context of this long-term administrative lock-up in a small cell where the prisoner is cut off, in some cases for years at a time, from human contact. In my experience, that is both unheard of and extremely harmful. Keeping a prisoner in such a small cell for so long without reasonable opportunity to leave the cell to exercise, to shower and/or to eat is also extraordinary and debilitating. It leads to further deterioration of the prisoner mentally and physically. Provision of inadequate light and/or sanitation in these conditions, again is virtually unheard of and harmful, since the prisoner has no choice, except for very limited and few time periods, to remove himself from the cell. Deficiencies in food, program and cell furnishings also add much more than they would otherwise to the striking inadequacy of the conditions of such prisoners' confinement, as determined by sound penological and humane standards." (First Pontesso Decl., pp. 15-16, ¶35.)

approximately five to six feet wide and eight to nine feet long (First Sumner Dep., pp. 3:27-28, 4:1-2; Jenkins Decl., Def. Ex. G, p. 1:21-22). 5/ Each cell is furnished with a bed of some sort and a thin mattress, a pillow and blanket, a coverless toilet, and a sink (Jenkins Decl., Def. Ex. G, p. 2:19-20; Baker Decl., Def. Ex. K, p. 2, ¶4). No desk or chair is provided and each inmate is supplied with a cardboard box in which to keep his personal belongings (Freitas Decl., Def. Exh. D, p. 2:27-29; Baker Decl., Def. Ex. K, p. 2:26-27; First Pontesso Decl. p. 6, ¶14). Shelf space is minimal, and in some cases, non-existent

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5/ Minor differences may exist among defendants' units as to cell size. These variations, however, are not material, especially since members of plaintiffs' class are frequently moved between units.

(Freitas Decl., Def. Ex. D, p. 2:26-27). Many of these cells are windowless (Baker Decl., Def. Ex. K, p. 1, ¶3; Jenkins Decl., Def. Ex. G, p. 1:23-24; Anderson Decl., p. 2:17-20).

4. Bad cell conditions are exacerbated by defendants' practice of involuntary double-celling, wherein two prisoners are required to share a single cell (First Sumner Dep., pp. 15:7-9, 17:1-12). For example, in San Quentin, as many as 80 prisoners have been double-celled (First Sumner Dep., p. 45:11-12) and 237 of the 387 cells in the Management Control Unit have been prepared for double-celling (Nyberg Decl., Def. Ex. I, pp. 1:31; 2:1). Double-celling was reinstituted in the Protective Housing Unit at San Quentin (Barron Decl., p. 1:7-8; Priley Decl.,

p. 1:7-8; Bevan Decl., p. 1:8-9; Woodhouse Decl., p. 1:7-8).

5. This Court agrees with defendants Sumner and Rushen that the practice of double-celling of prisoners in administrative segregation is "inhuman" (First Sumner Dep., pp. 14:26-18, 15:1; Rushen Dep., p. 18:16-24; see Haney Decl., pp. 4-5, ¶¶9-10). Double-celling engenders violence, tension, and psychiatric problems (First Sumner Dep., pp. 14:26-28, 15:1-6; Rushen Dep., p. 18:19-24; First Kupers Decl., Pl. Ex. F., p. 6, ¶8; First Pontesso Decl., p. 5, ¶12, p. 15, ¶35). Defendants' regulations appear to recognize as much by requiring even prisoners in disciplinary detention to be housed in single cell occupancy whenever

possible (Cal.Admin.Code, tit. 15, § 3331(b)).

Clothing, Bedding, and Laundry

6. The provision of clean clothing, bedding, and laundry has at best been irregular. Prisoners have received soiled bedding, a change of underwear once a week at best, clean shirts and pants once a month, towels once every three weeks, and linens once every two weeks (Placencio Decl., p. 2:8-10; White Decl. (4/8/81), p. 4:12-16; Ferrel Decl., p. 4:29-32; Alden Decl., p. 3:9-10). At worst, weeks and months go by without an exchange of laundry (Carbone Decl., p. 4:6-8; Hawthorne Decl. (5/21/81), p. 4:17-19; McCormick Decl., p. 1, ¶1; Placencio Decl., p. 2:8-10).

Lighting, Heating, Ventilation and Plumbing

7. For many prisoners in administrative segregation, a single bare light bulb of inadequate wattage in the cell constitutes the primary source of light (Johnson Decl., p. 1:31; Harp Decl., p. 2:26-27; Hawthorne Decl. (6/3/80), pp. 1:32, 2:1-2; Fred Mendoza Decl., p. 2:7-12). Director Rushen has acknowledged that the lighting in some of the units is "exceptionally dim" (Rushen Dep., p. 13:19; accord First Pontesso Decl., p. 7, ¶17). Inadequate lighting has adversely affected the eyes of some prisoners (Fred Mendoza Decl., p. 2:7-12; Daniel Mendoza Decl., pp. 2:27-31, 3:1-2).

8. Heating and ventilation have been established as inadequate. Prisoners' cells are hot and stuffy in

the summer and cold in the winter (Rodgers Decl., Def. Ex. F., p. 2:2-4; Anderson Decl., p. 2:2-3; Hawthorne Decl. (6/3/80), p. 2:8-9; Jones Decl., pp. 4:26-32, 5:1-3; accord First Pontesso Decl., p. 7, ¶16; Haney Decl., pp. 6-7, ¶14). Warden Sumner has acknowledged difficulty in maintaining temperature control (First Sumner Dep., p. 12:6-11; see White Decl. (4/8/81), p. 3:11-12).6/

6/ The environmental conditions are illustrated by the following excerpt from one of plaintiffs' declarations:

> "It can become extremely cold on the tier in the winter, even with the heaters. This is made worse by the broken windows. In bad weather, the rain will come through the windows and make the tiers wet and the area in front of one's cell wet. Putting shelter up against the door will subject me to disciplinary charges . . . . On the other hand, in the summer it can get extremely hot, especially on the 5th tier where I am. The air will be stuffy and I will have

(Footnote Continued)

These conditions are exacerbated by the numerous broken windows in administrative segregation (as many as one-quarter of the windows in some units) (Tabash Supp. Decl., p. 4:5-6; First Pontesso Decl., p. 7, ¶16).

(Footnote Continued)

> to strip down to my shorts to make it more bearable." (Jones Decl. (4/29/80), pp. 4:26-32, 5:1-3.)

Arnold Pontesso observed similar conditions during a recent inspection of San Quentin:

> Many broken windows were found in several of the lock-up units I inspected, especially at San Quentin. The amount of filth and crud on the perimeters of the broken windows indicated that they had been broken for long periods of time without being replaced. One section at San Quentin with a number of broken windows (C Section, SHU #3) was extremely drafty and cold the day I was there, April 8, 1981--which was a sunny day. It was so cold that I observed many prisoners in that unit who had wrapped themselves in blankets in the middle of the day." (First Pontesso Decl., p. 7, ¶16.)

9. Plumbing conditions are likewise inadequate (see First Sumner Dep., p. 16:27-28). Plaintiffs have experienced problems with the plumbing, resulting in leaking toilets, wet floors, water shut-downs, and the prevention of toilet flushing (Tabash Supp. Decl., p. 3:8-19; Carbone Decl., p. 3:6-8; Lennard Vaughn Dcl., p. 3:13-19; Long Decl., p. 2:11-20). Defendants admit to leaking toilets and are considering requiring prisoners to "use covered chamber pots . . ." (Tabash Supp.Decl., p. 3:8-19). The unhealthy environment caused by the inadequate plumbing was graphically illustrated by the presentation to the Court of a package of mosquitoes caught in one day by a prisoner in his cell located near a stopped-up drain (see McCormick Decl.,

p. 2, ¶8; Satris Decl. (1/6/82), pp. 6:13, 7:1 (exhibit J)).

Sanitation

10. Rodents and insects are present in cells, as well as dirt and excrement (Freitas Decl., Def. Ex. D, p. 3:2-7; Spoon Decl., Def. Ex. J., p. 3:5-15; Anderson Decl., p. 4:4-5; Ferrel Decl., p. 4:19-22; White Decl. (6/2/80), p. 3:3-8; Blackwell Decl., p. 2:28-31; Long Decl., p. 2:3-5). Cells are not cleaned between occupation by different prisoners (Milburn Decl., p. 4, ¶13; Daniel Mendoza Decl., p. 2:21-26; Lennard Vaugh Decl., p. 2:10-14). Prisoners are not provided with adequate means to clean their cells (Jordan Decl., p. 2:24-27; Daniel Mendoza Decl., p. 2:11-20; Milburn Decl., p. 4, ¶13; Long Decl., p. 2:5-10; Gorrell Decl., p. 3:11-15; Lennard Vaughn Decl., p. 2:15-20; see First Pontesso

Decl., p. 4, ¶10; Haney Decl., p. 5, ¶11).

Fire Safety

11. Fire fighting preparation has proven inadequate. Materials used for fire fighting are inoperative, insufficient, or else nonexistent (Edgar Smith Decl., p. 4:5-11; McCollum Decl., pp. 2-6). Access to fire extinguishers and hoses is made difficult, and in some circumstances, impossible (McCollum Decl., pp. 2-6). Guards are unprepared and untrained in the use of such equipment (McCollum Decl., pp. 2-3; Edgar Smith Decl., p. 4:5-8). In at lest some units, there is no fire alarm system nor any sprinkler system (McCollum Decl., p. 5:8-10). Nor do emergency or fire exits exist in some units (McCollum Decl., p. 4:16). The only way in which an inmate may call for help in fighting

or suppressing a fire is by shouting for help to guards, who are frequently beyond calling distance and out of sight from the cell (McCollum Decl., p. 5:16-24). Such lack of fire fighting preparation resulted in the death of two San Quentin inmates confined in administrative segregation in 1981 (McCollum Decl., pp. 2:2-30, 3:1-16; Edgar Smith Decl., p. 4:5-11).

Exercise

12. Many prisoners in administrative segregation are required to spend virtually their entire lives in their cells, often as much as 23-1/2 hours a day (Redd Decl., p. 3:3-6; Woodhouse Decl., p. 2:12-16; Long Decl., p. 2:30-32; Daniel Mendoza Decl., pp. 3:30-32, 4:1-3). Most do not receive daily exercise (Nyberg Decl., Def. Ex. I, p. 6:12-14; Rohrer Decl., Def. Ex. C,

p. 2:6-14; Baker Decl., Def.Ex. K, p. 2:20-22). Many do not receive any outdoor exercise at all (Acosta Decl., p. 2:7-11; Riney Decl., p. 5:11-12; Gonzalez Decl., p. 4:1-2; Redd Decl., p. 3:3-6). In San Quentin, for example, one entire unit is deprived of exercise altogether and other units are provided exercise only twice a week (Satris Decl. (1/6/82), p. 6:5-10 (see exhibit H); Reece Decl., p. 2:29-30; McCormick Decl., p. 1, ¶3; Tabash Supp.Decl., p. 5:19-26). Warden Sumner has acknowledged that he is unable to provide the amount of exercise for inmates deemed necessary for prisoner health and institutional security (First Sumner Dep., p. 14:18-23; Second Sumner Dep., p. 41:2-6; see First Pontesso Decl., p. 11, ¶26). Inadequate exercise debilitates a prisoner's well-being (Haney Decl., pp. 8-9, ¶¶19-20; p. 10,

¶22; First Kupers Decl., Pl. Ex. F, p. 7, ¶10; see First Pontesso Decl., p. 12, ¶29). One common effect is described by Mr. Pontesso as "self-hypnosis," wherein prisoners may sleep for up to 20 hours a day due to the lack of physical or mental stimulation (First Pontesso Decl., p. 12, ¶29; Haney Decl., pp. 8-10, ¶¶19-22; pp. 16-17, ¶¶40-42).

Rehabilitation and Training

13. The minimal allowance of exercise is compounded by the lack of meaningful activities. Prisoners do not have access to jobs, to vocational training, or to education courses beyond the high school level (First Sumner Dep., pp. 30:22-28, 31:1-4; Second Sumner Dep., pp. 109:7-28, 110:1-9; Baker Decl., Def. Ex. K. p. 4:29-30). Hobby and art materials are also denied to the prisoners (Larry Smith Decl., p. 6:4-8;

Stroup Decl., pp. 5:32, 6:1; Love Decl., p. 3:13-15; Harp Decl., p. 4:11-14). Both Warden Sumner and Director Rushen have stated that the lack of vocational, educational, and recreational activities engenders boredom, tension, and idleness (Second Sumner Dep., p. 112:3-7; Rushen Dep., pp. 26:16-28, 27:1-2). This view is shared by Dr. Haney and Mr. Pontesso (Haney Decl., pp. 8-10, ¶¶ 19-2; pp. 16-17, ¶¶40-42; First Pontesso Decl., p. 12, ¶29).

Law Books

14 No direct access to the law library is provided to prisoners in administrative segregation (First Sumner Dep., p. 31:15-18). Prisoners may request books to be brought to them, but long delays of from weeks to months between request and receipt occur (First Sumner Dep., p. 33:23-25; Otis Smith

Decl., p. 3:3-6; Jenkins Decl., p. 2:23-24). Lack of access to the law library has made legal research extremely difficult (Daniel Mendoza Decl., pp. 4:29-32, 5:1-6). No list of books in the law library is provided (Daniel Mendoza Decl., p. 4:30-31; Benton Decl., p. 3:4-6), nor are inmates provided with legal training or legal assistance from other inmates (Fred Mendoza Decl., pp. 2:28-31, 3:1-2; Benton Decl., p. 3:4-6). Some inmates are permitted only three law books at a time, which must be surrendered before new ones are delivered (Otis Smith Decl., p. 3:6-8; Benton Decl., p. 3:3-4).

Visitation, Telephone, and Mail Service

15. Many prisoners are denied contact visits with family members or friends. (Davis Decl., Def. Ex. E, p. 3:24-25; First Sumner Dep.,

p. 34:9-12; Larry Smith Decl., p. 2:12-15; Long Decl., p. 3:26-28; Daniel Mendoza Decl., p. 4:16-20).[7/] These prisoners are required to conduct all visitation behind a glass barrier and over telephones (see Pl. Ex. E-2; Larry Smith Decl., p. 6:8-10; Fred Mendoza Decl., p. 3:9-11; Ferrell Decl., p. 5:3-6; Harp Decl., p. 3:22--24). At the Deuel Vocational Institution, there are only two telephone visiting booths for over 300 prisoners (Long Decl., p. 3:30-32).

16. Warden Sumner and Director Rushen acknowledge the beneficial effects of contact visits upon a prisoner's

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[7/] A contact visit is a visit with no physical barriers other than moveable furniture between the inmate and the visitor, and without the inmate being shackled or otherwise physically restrained.

well-being (First Sumner Dep., p. 24:5-10; Rushen Dep., p. 39:16-24). Prisoners in administrative segregation have found that the restrictions placed upon visitation result in unfulfilling and frustrating visits, adversely affecting personal relationships (Rushen Dep., p. 39:8-20; Acosta Decl., p. 2:12-14; Daniel Mendoza Decl., p. 4:24-28; Fred Mendoza Decl., p. 3:14-15). Such adverse effects have been confirmed by psychiatric experts (First Kupers Decl., Pl. Ex. F, pp. 6-7, ¶9; Haney Decl., pp. 12-13, ¶¶29-30; accord First Pontesso Decl., pp. 7-11, ¶¶19-25, pp. 14-16, ¶35).[8]

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[8] More importantly, however, this policy ignores the consequences of depriving men of intimate, personal contact with their family members. It ignores the deep sense of anger and the

(Footnote Continued)

17. Delivery and mailing of prisoner correspondence is often obstructed by prison authorities (Johnson Decl., p. 4:20-25; Jenkins Decl., p. 3:6-8; Harp Decl., p. 5:3-4; Hawthorne Decl.

(Footnote Continued)

abject desperation created in men who have been dienied what is, for many, the only bright spot in an otherwise barren prison existence. It ignores also the benefits of normal and positive social interaction for men whose lives are otherwise dominated by the strained and unnatural interactions of prison. And it ignores, finally, the consequences of severing what may be the prisoner's only important and meaningful ties to the world outside the prison.

> "In the worst case, this deprivation may have irreversible consequences for the relationships as well as for the prisoners. Many relationships will simply fail to survive the total absence of meaningful, private contact that segregation in security housing now requires. In the name of giving prisoners "something to work for," termination of family visits in segregation may guarantee that prisoners have nothing left to work for when they come out." (Haney Decl., p. 14, ¶¶33-34.)

(6/3/80), p. 4:10-13; Daniel Mendoza Decl., p. 5:7-12; Benton Decl., p. 4:6-8). Such practices have been expressly proscribed by defendants' own administrative regulations. Cal.Admin.Code, _____. 15, § 3343(e).

Medical, Dental and Psychiatric Care

18. Prisoners often experience difficulty in obtaining reasonably prompt access to necessary medical attention. A request for medical care must be made through a Medical Technical Assistant (MTA) who alone decides whether the prisoner will see a doctor (Hawthorne Decl. (6/3/80), p. 3:25-29). Many inmates must wait weeks or months before they are permitted to see a doctor or dentist (Hawthorne Decl. (6/3/80), p. 3:27-29; Olmos Decl., p. 2:22-30). Access to psychiatric care is even more difficult (Otis Smith Decl., p. 3:26;

Redd Decl., pp. 3:18-32, 4:1-5, accord, Haney Decl., pp. 11-12, ¶27).

Arbitrary Placement, Retention, and Length of Term in Administrative Segregation

19. In its decision on the first claim for relief (Wright I), this Court held that members of plaintiffs' class could not be confined in segregation for administrative reasons unless provided with enumerated procedural safeguards. In response, the California Department of Corrections (CDC) enacted administrative regulations establishing guidelines for placement and retention in segregation. Cal.Admin.Code, tlt. 15, §§ 3335-3338. However, despite this Court's decision on the first claim, plaintiffs continue to be arbitrarily placed and retained in segregated housing.

20. Plaintiffs' declarations and prison records reveal that (1) prisoners continue to be placed in administrative segregation without any written reason for days well beyond the 48-hour requirement specified in CDC regulations; (2) written explanation for placement in administrative segregation is often vague and conclusory in terms;
(3) counsel-substitute (staff assistant) to aid in the preparation of the prisoner's case is often denied, even when assistance is clearly warranted;
(4) access to investigating employees is often denied to prisoners;
(5) investigating reports may be inadequate or not be received until after the hearing; and (6) explanations of the reasons for the decision reached and references to the evidence in support of the decision are inadequate (Taylor

Decl., p. 2:11-14; Thorn Decl., pp. 1:28, 2:3; Owens Decl., p. 2:13-15; Satris Decl. (1/6/82), pp. 2-5; Maxwell Decl., p. 2:10-11; Terry Alexander Decl., p. 2:1-2; Frazier Decl., p. 1:31-32; Love Decl., p. 2:15-18; Riney Decl., p. 2:21-26; Moore Decl., p. 2:24-32; Lucas Decl., p. 3:13-14; Washington, Jr., Decl., p. 2:22-32; Stroup Decl., p. 2:10-11, 27-29; see Satris Decl. (4/13/81) [and exhibits]).

21. As to the hearing itself, the evidence discloses that (1) the ten-day time limitation within which the prisoner must have his hearing, as mandated by CDC regulations, is often disregarded;
(2) requests by inmates for witnesses are often denied without reason;
(3) confidential information may be admitted without a showing as to its reliability beyond conclusory

representations by officials; and (4) the prisoner may be involuntarily absent from the hearing or, as in one reported case, there may not even be a hearing (Salinas Decl., p. 2:12-29; Owens Decl., p. 2:10-11; Taylor Decl., p. 2:22-23; Jones Decl. (12/4/81), p. 2:10-19; Riney Decl., pp. 1-4; Frazier Decl., p. 2:1-21; Gibson Decl., p. 2:6-22; Love Decl., p. 2:10-14; Washington, Jr. Decl., pp. 1-3, ¶¶3-7; see Satris Decl. (1/6/82), pp. 5:19-30, 6:1-4).

22. For many prisoners, the punishment inflicted as a result of conditions in administrative segregation is grossly disproportionate to the offense which resulted in their placement therein (First Pontesso Decl., p. 3, ¶7). For example, plaintiffs' declarations disclose a policy at San Quentin to simply warehouse in administrative

segregation for the duration of their confinement prisoners who previously had been found in possession of a weapon (Brooks Decl., p. 2:5-12, 20-26); who previously had been found to have been involved in a racial confrontation (Taylor Decl., p. 2:3-20; Satris Decl. (1/6/82), p. 3:16-4:2); who previously were thought to have assaulted another prisoner, even if during a previous term (Satris Decl. (1/6/82), p. 4:3-20); who had been paroled from an administrative segregation (Satris Decl. (1/6/82), pp. 2:23-3:15); or who previously had served a Security Housing Unit term (Brooks Decl., p. 2:5-12). Pursuant to these policies, prisoners transferred to San Quentin for reasons other than their conduct will automatically be placed in administrative segregation even if they have experienced no problems at the institution from which they had transferred (Taylor Decl., p. 2:1-26 (mainline at Soledad to administrative segregation at San Quentin); Brooks Decl., p. 1:29-2:12 (mainline at California Men's Colony to administrative segregation at San Quentin)).

23. A prisoner will be even more adversely affected, both psychologically and physically, by an oppressive environment when his placement in administrative segregation is determined arbitrarily (First Pontesso Decl., pp. 14-16, ¶35; see First Kupers Decl., Pl. Ex. F., pp. 11-12, , ¶20. 9/

9/ As Dr. Haney notes:
"Not surprisingly, in this context, prisoners regard administrative decisions to retain or release them from segregation as the product of caprice or, at best, luck. It helps to increase their sense of powerlessness and
(Footnote Continued)

24. Defendants' placement of prisoners in segregation for gang related reasons is especially susceptible to arbitrariness. For example, one prisoner was kept in segregation because at one point during his previous prison term he was considered a "possible associate" of a prison gang (Satris Decl. (1/6/82), p. 2:8-22 (see exhibit A)). Consultants to the California legislature have noted that in San Quentin alone there are approximately 300 prisoners segregated as gang members, associates, or possible affiliates (Rosen Decl. (5/7/81), pp.

(Footnote Continued)

purposelessness in this situation. And the absense of effective counseling services in these units means that prisoners are unlikely to feel that they have any allies whatsoever in the system on whom they can depend or trust. Their sense of alienation, vulnerability, helplessness, and fear is increased accordingly." (Haney Decl., p.11, ¶26.)

1:31-2:2 (see Exhibit I at pp. 41-43)). "This system of separating all suspected gang affiliates becomes a negative self-fulfilling prophecy, in which administration policies designed to control gang violence often perpetuate the very gang associations they seek to curtail" (id., at 43).

25. Once administrative segregation is effected, a prisoner's length of confinement may be of indefinite duration. Director Rushen has stated that lengthy confinement in administrative segregation is a "very devastating experience" (Rushen Dep., p. 44:17-18). Warden Sumner has acknowledged that a prisoner may exhibit exemplary behavior for over a year but still remain in segregation (First Sumner Dep., p. 22:24-27; Satris Decl. (1/6/82), pp. 2:8-22; 4:11-15). Continued

confinement in segregation may occur even where the disciplinary charges which led to a prisoner's initial placement have subsequently been dismissed (Ferrel Decl., p. 3:6-16; Salinas Decl., p. 2:12-14; Larry Smith Decl., pp. 2:7-30, 3:1-5).

26. Warden Sumner has admitted that some prisoners have been in administrative segregation for over one year, and others for more than two years (First Sumner Dep., p. 8:16-20; Acosta Decl., pp. 1:29-32, 2:1-6). Over 1,700 prisoners have been in administrative segregation for over 30 days (Answers to Plaintiffs' Fifth Set of Interrogatories by director Rushen). Furthermore, 1,047 prisoners have been in administrative segregation for more than six months, 621 prisoners have been there for over a year, and 337 prisoners have been there

for over two years (Answers to Plaintiffs' Fifth Set of Interrogatories by Director Rushen).[10]

27. Conditions in administrative segregation seriously debilitate the physical and psychological well-being of members of plaintiffs' class. The stress which almost invariably occurs from prison life is intensified by placement in segregation for a prolonged period of time. Ironically, confinement in administrative segregation can promote the very hatred and violence which it attempts to prevent.[11]

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[10] These figures include inmates confined at Folsom State Prison. They also include the relatively few who are in segregation voluntarily.

[11] "[I]t is my firm opinion that violence is not prevented, but is caused by the constraints on prisoners' lives that I have mentioned. A self-fulfilling

(Footnote Continued)

Violence and Guard Behavior

8. The increased violence which results from such conditions is often directed at the inmate himself. Plaintiffs' declarations reveal that suicides and acts of self-mutilation are frequent occurrences (Carbone Decl., Pl. Ex. F, p. 13, ¶22). Additionally, in one

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(Footnote Continued)

prophecy is established. The men are denied human needs such as adequate contact with loved ones, a decent private space to live in, some control over their own environment, some say about their privileges and deprivations, some productive outlet and a chance to learn and grow. Then, they become increasingly resentful. Fear, hostility and conffusion well up inside them. Some act violently, in impotent acts like throwing garbage or yelling at a guard, and then are further constricted and punished. A population of hateful prisoners is bred who have few options to express self, who are made incapable of being intimate and tender, and who are not prepared to work or live outside the prison setting." (First Kupers Decl., Pl. Ex. F, p. 14:23-26; see Haney Decl., pp. 15-17, ¶¶37-41; First Pontesson Decl., pp. 2-3, ¶¶5-8, pp. 13-16, ¶¶32-35.)

unit alone at San Quentin, there were four suicides within a six month period (Reece Decl., p. 3:13-14).

29. The conditions in administrative segregation similarly heighten the level of violence on the part of correctional officers. Excessive use of firearms, tear gas and guard brutality have been reported. (Johnson Decl., p. 2:8-14; Reece Decl., p. 3:13-15; Hawthorne Decl. (6/3/80), p. 4:5-9; Otis Smith Decl., p. 3:31-32).

Security Considerations

30. In its decision, the Ninth Circuit stated that prior to granting any judicial relief, "it must be made evident to a reviewing court that the district court did in fact focus on the impact of its remedies, even when cast only in the form of a preliminary injunction, on prison security and the resources of the

state" (Wright II, supra, 642 F.2d at 1134). Plaintiffs and defendants have submitted evidence to this Court addressing the matters of security. Upon thorough and careful examination of the evidence, this Court is satisfied that the preliminary injunction it grants poses not threat to security. On the contrary, the Court finds that the preliminary injunction will reduce greatly the threat of both physical and emotional violence to inmates and to prison staff (Haney Decl., p. 15, ¶36).

31. For example, with regard to visitation, Mr. Pontesso has determined that contact visitation for prisoners in administrative segregation would not jeopardize security at defendants'

institutions.[12/] Warden Sumner has acknowledged that "gang leaders" in the Management Control Unit at San Quentin receive both conjugal and contact visits, apparently without threat to security (Sumner Decl. (4/28/81), p. 5:6-10). The

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[12/] "In my experience, even violence-prone prisoners pose a minimal threat to security during contact visits because they are interested in preserving family ties and are on their best behavior in the visiting room so that they do not jeopardize their outside relationships. In my experience, violent incidents in the visiting room have been rare and usually due to the carelessness of staff. Search and surveillance of inmates and visiotrs by staff, s already practiced by the CDC, generally are sufficient to assure proper security in connection with contact visits.

"Search procedure of inmates include a 'skin frisk' and a thorough search of clothing. Visitors are required to remove all articles from pockets, outer clothing is searched, and each visitor msut pass through a metal detector. These procedures are appropriate and generally adequate to maintain security during contact visits." (First Pontesso Decl., p. 8, ¶¶20-21.)

psychological benefits accruing from such visitation would have a stabilizing effect upon an inmate (First Pontesso Decl., pp. 8-9, ¶22; pp. 10-11, ¶25; Haney Decl., pp. 12-13, ¶¶29-30; p. 14, ¶¶33-34). This in turn would mitigate the stress of prison life, thereby lowering the threat of violence.

32. Increased periods of exercise promote both the physical and mental well-being of prisoners in administrative segregation, particularly since they are forced to remain in their cells for substantial periods of time (First Pontesso Decl., p. 11, ¶26; First Sumner Dep., p. 14:18-25; Second Sumner Dep., p. 41:2-6).

33. This Court's restrictions on double-celling pose no threat to the security of defendants' institutions. Evidence presented by both plaintiffs and

defendants demonstrates that the practice of double-celling engenders violence, tension, and psychiatric problems (First Pontesso Decl., p. 5, ¶12; p. 15, ¶35; First Sumner Dep., pp. 14:26-28, 15:1-4; Rushen Dep., p. 18:16-24; First Kupers Decl., pl. Ex. F, pp. 5-6, ¶8; See Haney decl., pp. 4-5, ¶¶9-10). Single-celling would lessen substantially the level of tension and potential violence by prisoners in administrative segregation.

34. None of the other provisions contained in the preliminary injunction, such as those for adequate lighting, showers, and for procedural requirements as to placement and retention in administrative segregation requires any greater security measures than currently exist or enhances the threat of violence (First Pontesso Decl., p. 7, ¶17; pp. 11-12, ¶28; pp. 2-3, ¶¶5-8,

pp. 13-14, ¶¶32-34; see p. 13, ¶31). Long-term confinement in administrative segregation may engender violence. Many jurisdictions have found that short-term confinement in administrative segregation is more successful than long-term confinement therein for the control of prison violence (First Pontesso Decl., p. 14, ¶¶33-34).[13]

35. This Court's preliminary injunction provides safeguards which authorize denial of the provisions

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[13] With particular reference to segregation of gang members, the consultants to the California Legislature concluded as follows:

> [t]his process of separating hundreds of identified or suspected gang affiliates is not at all a conservative or overcautious approach. It is, in fact, a dangerous process which can create additional violence." [Original emphasis.] (Rosen Decl. (5/7/81), pp. 1:31-2:1 (see exhibit I, p. 43)).

contained therein upon proof that security would in fact be jeopardized. Defendants may retain a prisoner in the security housing unit if "his release would severely endanger the lives of inmates or staff or the security of the institution." And defendants may retain prisoners in other administrative segregation units based upon reliable information demonstrating "that the prisoner is involved in or is planning activity which would threaten his own safety or the safety of others" or "that a prisoner in a security housing unit will be killed or forcibly assaulted or will attempt a forceable escape, or that the prisoner himself will kill, commit a forcible assault, or will be the principal in a forcible escape attempt." The injunction contains an over-all clause which permits suspending compliance during a state of riot or turmoil or other emergency.

Cost Considerations

36. This Court is satisfied that the improvements of the conditions of confinement contained in this injunction would not impose significant added cost to defendants.[14] This Court finds that

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[14] Arnold Pontesso states in his declaration:

> "D]efendants' estimation of the costs of compliance with . . . [the original Preliminary Injunction] appear grossly inflated. Indeed, one probably could build a good, small maximum security facility for the price of the Soledad estimate [of $13,000,000]. Improvement of the conditions of confinement at the institutions I visited could be accomplished at very little cost. Through imaginative utilization of existing facilities, DVI has made progressive improvements with a small capital outlay. Imaginative utilization of existing space has generated permanent improvements in the conditions of confinement at that facility." (First Pontesso Decl., pp. 12-13, ¶30.)

defendants' cost estimates are based upon unsubstantiated speculation. The evidence demonstrates that improvements in areas such as outside exercise, contact visitation, and showers can be implemented with minor expense. (First Pontesso Decl., pp. 5-6, ¶13, pp. 12-13, ¶30, pp. 7-11, ¶¶19-25, pp. 11-12, ¶28). This Court notes that on September 15, 1981, California Senate Bill (S.B.) No. 176 was signed into law by Governor Edmund G. Brown, Jr. (Satris Decl. (11/3/81), p. 2:25-30). That bill appropriates almost one and one-half million dollars for conversion of East Block at San Quentin to a Management Control Unit (M.C.U.). It furthermore appropriates over 15 million dollars for partial construction of maximum security facilities at the California Correctional Institution (C.C.I.) at Tehachapi and over one-half million dollars for partial construction of a Security Housing Unit at Folsom State Prison.

Cost Bond Requirement

37. Plaintiffs have demonstrated that they are indigent prisoners who have proceeded _in forma pauperis_ and who have brought this action in the public interest, and in the interest of a large class of prisoners.

II

CONCLUSIONS OF LAW

[1,2] This Court is fully cognizant of the judicial restraint which federal courts must exercise in attempting to remedy Eight Amendment violations in a state prison. _Hoptowit v. Ray_ (9th Cir. 1982) 682 F.2d 1237, 1246. To that end, the function of federal courts is limited to determining if a constitutional

violation has occurred, and, if so, to fashion a remedy which does nothing more than correct the violation. Ibid. This Court is also aware, however, that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell (1974) 418 U.S. 539, 555-556, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935. Prison officials who engage in depriving prisoners of their constitutional rights will be allotted no deference from the federal courts. Palmigiano v. Garrahy (D.R.I. 1977) 443 F.Supp. 956, 979, aff'd, (1st Cir. 1980) 616 F.2d 598, cert. denied, 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45. Except for those necessarily lost as a result of confinement, prisoners retain all rights provided to free citizens. Id., Palmigiano, 443 F.Supp. at 978. Additionally, the institution heads have a state-mandated duty to follow the rules and regulations prescribed by the director for the administration of state prisons. Cal.Admin.Code, tit. 15, div. 3; Cal.Pen.Code §2079; see also In re french (1980) 106 Cal.App.3d 74, 85, n. 24, 164 Cal.Rptr. 800.

As expressed by this Court in its initial Findings of Fact and Conclusions of Law, and reiterated by the Court of Appeals: "To obtain a preliminary injunction a party must show either a combination of probable success on the merits or that serious questions are raised and the balance of hardships tips sharply in their favor." Wright II, supra, 642 F.2d at 1132; see Benda v. Grand Lodge of International Association (9th Cir. 1978) 584 F.2d 308, 314-15, cert dismissed, (1979) 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667. Upon application of these principles to the evidence and findings of facts, the Court makes the following conclusions of law:

A. Double-celling

[3] Given the unanimity of opinion as to the pernicious effects of this practice upon prisoners, this Court finds that double-celling in the context of administrative segregation in the housing units challenged in this action raises serious questions as to its constitutionality. The Court is mindful of the United States Supreme Court's recent decision in Rhodes v. Chapman (1981) 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59, wherein the practice of double-celling at the Southern Ohio Correctional Facility was held not unconstitutional. However, the factual differences in conditions of confinement between that institution and those in the

present case are significant. For example, while the square footage in *Rhodes* approximated 63 feet, the average cell in administrative segregation here is only 48 square feet. Furthermore, apart from the fact of double-celling, none of the conditions of confinement was deemed to constitute an Eighth Amendment violation. About 75 per cent of double-celled inmates in *Rhodes* were permitted considerable time outside of their cells; many of the cells had windows which could be opened or closed; all cells had a cabinet, shelf and radio, contact visitation was afforded to all inmates; "day rooms" for educational, occupational, and recreational opportunities were available; access to law books was available; medical care was adequate; and plumbing, lighting, heating, noise levels, and air circulation were all satisfactory. In contrast, many of the plaintiffs are required to remain in windowless cells of 48 square feet 23-1/2 hours a day, and endure conditions which, as explained below, are violative of the federal and state prohibition against cruel and unusual punishment.

Thus, whereas the institution in Rhodes was described as a "top-flight, first-class facility" (Rhodes, supra, 452 U.S. at 341, 101 S.Ct. at 2395,69 L.Ed.2d at 65, defendants' institutions are exactly the opposite. Since Rhodes, it has been suggested that the practice of double-celling violates the Eighth Amendment. See Heitman v. Gabriel (W.D.Mo. 1981) 524 F.Supp. 622.

This Court agrees with defendants Rushen and Sumner that the practice of double-celling prisoners in administrative segregation under conditions existing in the units challenged here is "inhuman" and concludes that it cannot withstand constitutional scrutiny.

B. Clothing, Bedding, and Laundry

[4] Federal courts acknowledge the necessity for providing clean clothing and bedding on a regular basis. Pugh v. Locke (M.D.Ala. 1976) 406 F.Supp. 318, 334, aff'd, in part, (5th Cir. 1977) 559 F.2d 283, rev'd. in part on other grounds, (1978) 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (per curiam); Ahrens v. Thomas (W.D.Mo. 1977) 434 F.Supp. 873, modif. in part, (8th Cir. 1978) 570 F.2d 286. This Court concludes that the failure to provide inmates with regular laundry service poses a serious constitutional question. It also violates defendants' own

regulations, which require that laundry items be issued and exchanged for segregated prisoners no less often that is provided for general population prisoners. Cal.Admin.Code, tit. 15, §3343(g).

C. Lighting, Heating, Ventilation and Plumbing

[5] Inadequate lighting, heating, ventilation, and plumbing are all conditions subject to Eight Amendment review. Hoptowit v. Ray, supra, 682 F.2d at 1256; Ramos v. Lamm (10th Cir. 1980) 639 F.2d 559, 568, cert. denied, (1981) 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239; Palmigiano v. Garrahy, supra, 443 F.Supp. at 961, aff'd, (1st Cir. 1980) 616 F.2d 598, cert. denied, (1980) 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45; Jordan v. Fitzharris (N.D.Cal. 1966) 257 F.Supp. 674, 683-84. The

debilitating psychological effects which inadequate lighting can have upon inmates was further noted in Palmigiano v. Garrahy, supra, 443 F.Supp. at 961, aff'd, (1st Cir. 1980) 616 F.2d 598, cert. denied, (1980) 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45. This Court concludes that the lighting, heating, ventilating, and plumbing conditions which are challenged here conflict sharply with common notions of human decency and constitute a serious question of compliance with the federal and state prohibition against cruel and unusual punishment.

D. Sanitation

[6] Lack of proper sanitation is likewise subject to constitutional scrutiny. Ramos v. Lamm, supra, 639 F.2d at 568, cert denied, (1981) 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239;

Williams v. Edwards (5th Cir. 1977) 547 F.2d 1206, 1211; Ahrens v. Thomas, supra, 434 F.Supp. at 902, modif. in part, (8th Cir. 1978) 570 F.2d 286; Jordan v. Fitzharris, supra, 257 F.Supp. at 682.

Defendants' sanitary practices threaten common notions of human living conditions. In addition, they have debilitating physical and psychological effects upon prisoners, resulting in physical illness, frustration, humiliation, and anger (Haney Decl., pp. 5-6, ¶¶11-12). As such, they create serious federal and state constitutional questions.

E. Food Service

[7] Problems with provision of food support this Court's conclusion that conditions in administrative segregation units raise serious constitutional

questions. Such conditions are the proper subject of Eighth Amendment scrutiny. Hoptowit v. Ray, supra, 682 F.2d at 1256. Defendants' feeding practices also violate their own regulations, which provide that prisoners in administrative segregation must be fed the same meal and ration as is provided general population prisoners, except that a sandwich meal may be served to prisoners in administrative segregation for lunch. Cal.Admin.Code, tit. 15, §3343(d).

F. Exercise

The physical and psychological health hazards promoted by defendants' failure to provide sufficient exercise to prisoners in administrative segregation affront all modern standards of human decency in a civilized society. The failure raises serious questions as to the constitutionality of defendants' practices. Spain v. Procunier (9th Cir. 1979) 600 F.2d 189, 199; Ruiz v. Estelle (5th Cir. 1982) 679 F.2d 1115, 1152; Ramos v. Lamm, supra, 639 F.2d at 570-571, cert denied, (1981) 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 239; Laaman v. Helgemoe (D.N.H. 1977) 437 F.Supp. 269, 309. In addition, defendants' practices violate their own regulations with regard to exercise. Cal.Admin.Code. tit. 15, § 3343(h).

G. Access to Law Books

[8] Denial of access to the legal system is a condition subject to Eight Amendment scrutiny. This Court concludes that defendants' practices with regard to access to law books raise serious questions as to their constitutionality. They also violate their own regulations. Cal.Admin.Code, tit. 15, § 3164(d).

H. Visitation

The debilitating effects of restrictive visitation have been recognized by a number of courts. Pugh v. Locke, supra, 406 F.Supp. at 327, aff'd, in part, (5th Cir. 1977) 559 F.2d 283, rev'd. in part on other grounds, (1978) 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (per curiam); Laaman v. Helgemoe, supra, 106 Cal.App.3d at 85, 164 Cal.Rptr. 800. Given the overwhelming evidence of potential social and psychological impairment upon prisoners as a result of a lack of outside contacts, this Court strongly questions whether current visitation practices are consistent with modern standards of human decency and are constitutionally permissible.

In addition, California statutory law accords prisoners the specific right to personal visits. Cal.Pen.Code, § 2601(d). Under that section, courts are required specially to scrutinize visiting restrictions, which will be upheld only if there is no less restrictive alternative available to satisfy reasonable security demands of the institution. In re Bell (1980) 110 Cal.App.3d 818, 168 Cal.Rptr. 100; In re French, supra, 106 Cal.App.3d at 84, n. 22, 164 Cal.Rptr. 800. Furthermore, defendants' regulations provide that prisoners in administrative segregation shall be permitted to visit under the same conditions as are permitted general population prisoners. Cal.Admin.Code, tit. 15, § 3343(f). Defendants' wholesale visiting restrictions on prisoners in administrative segregation thus also violate state law.

I. Mail Service

[9] Lack of adequate mail service is similarly a proper subject for consideration under the prohibition against cruel and unusual punishment. Bolding v. Holshouser (4th Cir. 1978) 575 F.2d 461, 464-465, cert denied, (1978) 439 U.S. 837, 99 S.Ct. 121, 58 L.Ed.2d 133; Laaman v. Helgemoe, supra, 437 F.Supp. at 322. Plaintiffs have demonstrated that defendants' current practices fall short of constitutional standards. Defendants' practices also violate their own regulations, which provide that prisoners in administrative segregation will not be restricted in the sending and receiving of personal correspondence. Cal.Admin.Code, tit. 15, § 3343(e).

J. Medical, Dental and Psychiatric Care

[10] The adequacy of all facets of medical care is clearly subject to Eighth Amendment scrutiny. Estelle v. Gamble (1976) 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251; Hoptowit v. Ray, supra, 682 F.2d at 1252-53; Todaro v. Ward (2d Cir. 1977) 565 F.2d 48; Gates v. Collier (5th Cir. 1974) 501 F.2d 1291, 1302. The threat which defendants' practices pose to the physical, mental and emotional well-being of inmates in administrative segregation is plain. This Court concludes that current practices in defendants' institutions conflict directly with notions of human decency. They also violate defendants' own rules which are designed to provide timely medical care. Cal.Admin.Code, tit. 15, § 3343(1).

K. Arbitrary Placement, Retention, and Length of Term in Administrative Segregation

Defendants' failure to provide the enumerated procedural safeguards to inmates enunciated in Wright I, supra, resulting in arbitrary placement into administrative segregation, and the lengthy, indefinite and disproportionate duration of confinement once administrative segregation is imposed, is of doubtful constitutionality under the federal and state prohibitions against cruel and unusual punishment. Hoptowit v. Ray, supra, 682 F.2d at 1257-58.

Calling long-term confinement in segregation "inhumane treatment in the form of physical and psychological cruelty," the court in Jefferson v. Southworth (D.R.I. 1978) 447 F.Supp. 179, 190, aff'd, (1st Cir. 1980) 616 F.2d 598, cert. denied, (1980) 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45 held it to constitute cruel and unusual punishment. Similar rulings have been made by other courts. Hutto v. Finney (1978) 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522; Hardwick v. Ault (M.D.Ga. 1978) 447 F.Supp. 116, 125; Allen v. Nelson (N.D.Cal. 1973) 354 F.Supp. 505, 511, aff'd, (9th Cir. 1973) 484 F.2d 960.

Expert witness testimony in similar cases has attested to the psychological and emotional harm which is caused by prolonged confinement under conditions such as those challenged here. Jefferson v. Southworth, supra, 447 F.Supp. at 189-90, aff'd, (1st Cir. 1980) 616 F.2d 598, cert. denied, (1980) 449 U.S. 839, 101 S.Ct. 15, 66 L.Ed.2d 45; Hardwick v. Ault, supra, 447 F.Supp.

at 125-26. The lengthy duration of time which most inmates are forced to spend in administrative segregation is shocking to the conscience of all reasonably civilized persons and conflicts directly with the prohibition against cruel and unusual punishment.

[11] Regardless of whether defendants' practices fall short of a clear Eighth Amendment violation, they violate the Director's regulations (Cal.Admin.Code, tit. 15, §§ 3337-3338), which were enacted in response to this Court's ruling in Wright I. Federal courts have found a violation of due process where state or local prison officials have failed to enforce or follow their own regulations. Giampetruzzi v. Malcolm (S.D.N.Y. 1975) 406 F.Supp. 836, 840; King v. Higgins (D.Mass. 1974) 370 F.Supp. 1023, 1028;

Lathop v. Brewer (D.Iowa 1972) 340 F.Supp. 873, 882. Accordingly, this Court concludes that defendants' failure to follow their own administrative regulations constitutes a violation of due process, as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution.

The Court is satisfied that recurrence of these practices can only be prevented by providing additional procedural safeguards. See *Ruiz v. Estelle*, *supra*, 679 F.2d at 1155--56. Such action is within the ambit of the Court's authority, and does not necessitate reconvening the three-judge court which decided Wright I. *Wright I*, *supra*, 462 F.Supp. at 404; see *Public Service Commission of Missouri v. Brashear Freight Lines, Inc*. (194~~1~~)

312 U.S. 621, 625, 61 S.Ct. 784, 786, 85 L.Ed. 1083; Hamilton v. Nakai (9th Cir. 1971) 453 F.2d 152, 160-161, cert. denied, (1972) 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332.

L. Unjustified Placement in Administrative Segregation

[12] Confinement in administrative segregation may be unconstitutional if imposed arbitrarily and if disproportionate to the reasons purportedly justifying such placement. See, generally, Furtado v. Bishop (1st Cir. 1979) 604 F.2d 80, 88, cert. denied, (1980) 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672; Adams v. Carlson (7th Cir. 1973) 488 F.2d 619, 635-36. This is so even where the segregation is denominated "administrative" rather than "punitive" or "disciplinary." Fitzgerald v. Procunier (N.D.Cal. 1975)

393 F.Supp. 335, 342; Allen v. Nelson (N.D.Cal. 1973) 354 F.Supp. 505, 511, aff'd, (9th Cir. 1973) 484 F.2d 960. Review of the evidence presented indicates that many prisoners are forced to endure conditions of administrative segregation which are plainly disproportionate to the offenses, if any, which led to their confinement therein.

M. Security Considerations

Upon thorough examination of all of the evidence, this Court is satisfied that the relief provided in its preliminary injunction is fully compatible with defendants' security concerns. It conforms to the Ninth Circuit's admonition that prior to granting any judicial relief, "it must be made evident to a reviewing court that the district court did in fact focus on the impact of its remedies, even when cast only in the form of a preliminary injunction, on prison security and the resources of the state." Wright II, supra, 642 F.2d at 1134. Compliance with the provisions of the injunction will not only eliminate constitutional violations but also lessen the threat of violence. Security will, as a result, be enhanced. If, contrary to the Court's evaluation, any provisions of the injunction require improved security, the Court finds that that can be effected at no significant increase of cost to defendants.

N. Cost Considerations

[13] This Court has been mindful of the Ninth Circuit's admonition regarding cost in constructing and appropriate remedy. Wright II, supra, 642 F.2d at 1134. The preliminary injunction issued herewith balances plaintiffs' rights with the practical need to minimize capital

expenditure. While the evidence raises serious questions as to the constitutionality of additional conditions (discussed, infra), the relief here granted is limited to remedying only those violations which demand urgent attention and which would not heavily tax the state's coffers. After trial of this matter, it may well be appropriate to grant relief on those conditions as well.

Consideration of costs has been a factor in tailoring the injunction to remedy only those violations which demand necessary and immediate attention.

O. Cost Bond Not Required

[14, 15] This Court concludes that no security should be required in connection with the issuance of this preliminary injunction. See Wayne Chemical Inc. v. Columbus Agency Service Corp. (7th Cir. 1977) 567 F.2d 692, 701;

Clarkson Co. Ltd. v. Shaheen (2d Cir. 1976) 544 F.2d 624, 632; Urbain v. Knapp Bros. Manufacturing (6th Cir. 1954) 217 F.2d 810, 816; "TOOR" v. U.S. Dept. of HUD (N.D.Cal.1973) 406 F.Supp. 1024, 1041; Hurwitt v. City of Oakland (N.D.Cal. 1965) 247 F.Supp. 995, 1005-06. Under appropriate circumstances the bond may be excused notwithstanding the literal language of Rule 65(c) of the Federal Rules of Civil Procedure. Shcerr v. Volpe (7th Cir. 1972) 466 F.2d 1027, 1035. Where, as here, suit is brought on behalf of poor persons, preliminary injunctive relief may be granted with no payment of security whatever. Bartels v. Biernat (E.D.Wis. 1975) 405 F.Supp. 1012, 1019; Denny v. Health and Social Services Board (E.D.Wis. 1968) 285 F.Supp. 526, 527 (three judge court).

P. Prospective Areas of Eighth Amendment Violation

In addition to the Conclusions of Law heretofore made, substantial evidence has been brought before this Court regarding conditions which may constitute, *inter alia*, cruel and unusual punishment. These conditions include (1) the inadequate size and furnishing of cells, (2) the denial of family visitation; (3) the constant din of noise in administrative segregation; (4) the lack of fire fighting readiness; (5) the level of guard brutality against inmates; (6) the absence of educational and vocational opportunities; (7) the lack of religious services for all inmates; and (8) excessive security. See *Hoptowit v. Ray*, *supra*, 682 F.2d at 1249-50, 1256; *Bono v. Saxbe* (7th Cir. 1980) 620 F.2d 609, 617; *Hutchings v. Corum* (W.D.Mo.

1980) 501 F.Supp. 1276, 1293; Palmigiano v. Garrahy, supra, 443 F.Supp. at 979, aff'd, (1st Cir. 1980) 616 F.2d 598, cert. denied, (1980) 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45; Laaman v. Helgemoe, supra, 437 F.Supp. at 323; Holt v. Sarver (E.D.Ark. 1970) 309 F.Supp. 362, 379, aff'd, (8th Cir. 1971) 442 F.2d 304. This Court declines to grant preliminary injunctive relief as to these conditions because, inter alia, of the capital expenditures needed to correct them. However, the declination is without prejudice to plaintiffs seeking relief at trial. [15]

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[15] Furthermore, this Court's previous ruling granting defendants' motion for summary judgment as to plaintffs' claim that the denial of sufficient inmate access to telephones is violative of the prohibition against cruel and unusual punishment was intended only for purposes

(Footnote Continued)

Q. Findings of Fact as Conclusions of Law and Vice Versa

To the extent that any finding of fact constitutes a conclusion of law, it is adopted as such and to the extent any conclusion of law constitutes a finding of fact, it is adopted as such.

R. Summary of Conclusions of Law

This Court has considered the evidence as to each of the above-discussed conditions of confinement separately under the guidance pronounced by the Ninth Circuit. Plaintiffs have raised serious questions as to the constitutionality of their confinement, indicating their probable success on the merits at trial and a balance of

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(Footnote Continued)

of preliminary injunctive relief. The constitutionality of this practice will be subject to further review at the time of trial. Fed.RulesCiv.Proc., Rule 54(b).

hardships in their favor in that they will suffer irreparable injury if relief is not granted. None of these conditions, standing alone, is compatible with modern standards of decency in a civilized society because of its harmful effects upon prisoners in administrative segregation.[16] In some instances, the

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[16] Although not dispositive upon this Court's findings or conclusions, it is noteworthy that many of the current conditions of confinement in administrative segregation fail to meet standards promulgated by the United States Department of Justice (Federal Standards for Prisons and Jails (1980)). For example, under the Federal Standards, placement in administrative segregation should be imposed sparingly, and only for disciplinary purposes (Fed.Stand., pp. 98-101, §§ 11.01-11.03). Double-celling in adminisntrative segregation is prohibited (*id*., at p. 17, §§ 2.03, 2.00). Inmates in administrative segregation are entitled to clothing, bedding, and linen, and to bathing, laundry, barbering, and hair care service on the same basis as the general population (*id*., p. 30, § 3.16

(Footnote Continued)

adversity which the prisoner must face is physical in nature, and readily apparent,

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(Footnote Continued)

(clothes), p. 30, § 3.18 (linen), p. 31, § 3.20 (laundry), p. 31, § 3.22 (showers at least 3 times a week), p. 42, § 5.10 (24 hour emergency medical and dental), p. 46, § 5.19 (daily access to health care). Furthermore, prisoners in administrative segregation are provided access to educational, commissary, library service, social services, counseling, religious guidance and recreation (id., p. 103, § 11.08; see id., p. 110, § 12.02 et seq. (mail), p. 119, § 14.03 (jobs), p. 122, § 15.02 (religion), p. 126, § 17.01 (education), p. 126, § 17.02 (vocational training). They are also afforded exercise outside their cells and, if possible, outdoors, a minimum of one hour per day at least five days a week (id., p. 106, § 11.19), opportunities for visitation equal to those offered the general population (id., p. 106, § 11.19), normal institution meals (id., p. 108, § 11.18), and access to legal and reading materials (id., p. 106, § 11.20). Federal courts have looked to standards promulgated by professional associations as a relevant indication of Eighth Amendment violations. See, e.g., Palmigiano v. Garrahy, supra, 443 F.Supp. at 979-980, n. 30, aff'd, (1st Cir. 1980) 616 F.2d 598, cert. denied, (1980) 449 U.S. 839, 101 S.Ct. 115, 66 L.Ed.2d 45; Jordan v. Fitzharris, supra, 257 F.Supp. at 683-84.

as in the case of improper medical care, unsanitary living conditions, and inadequate lighting. In many instances, however, the injury incurred by the prisoner is psychological in nature, severely debilitating his mental well-being. The resulting effect engenders tension, hatred and alienation which find release in violence.

This Court agrees with the California Supreme Court's characterization of the administrative segregation units as "gruesome places teeming with tension and hostility." _In re Davis_ (1979) 25 Cal.3d 384, 388, 158 Cal.Rptr. 384, 599 P.2d 690. The chances for inmate reform and reintegration in society are reduced as inmates are deprived of human needs and forced to endure needlessly degrading conditions.

[16] The conditions prohibited by this Court's preliminary injunction endanger not only the safety and sanity of prisoners; they endanger their custodians as well and, in the end, the citizenry at large. They are conditions which breed violence and dangerous disregard of human decency. Their constitutionality under the Eighth Amendment of the United States Constitution and Article I, section 17 of the California Constitution is in serious doubt. Existence of these conditions calls for the issuance of the preliminary injunction, both on federal constitutional grounds and, as well, on the basis of the Court's pendent jurisdiction of claims arising under state law.

The Court declares the foregoing as its findings of fact and conclusions of law under Rule 65(d) of the Federal Rules of Civil Procedure.

PRELIMINARY INJUNCTION

It is ORDERED, ADJUDGED AND DECREED as follows:

Defendants, the Director of the California Department of Corrections, the Wardens and Superintendents of the California State Prison at San Quentin, Deuel Vocational Institution at Tracy, and Correctional Training Facility at Soledad, their agents, servants, employees, successors in office and all persons in active concert or participation with them, are hereby enjoined as follows:

I.

It is not the intent of this Preliminary Injunction to prohibit nor does it prohibit the Director or any Warden or Superintendent from temporarily suspending compliance with all or any part of this injunction during a state of riot or turmoil or other emergency. Nor does this Preliminary Injunction require defendants to relieve any prisoner from the consequences to that prisoner of any damage done deliberately by such prisoner to any prison facility and/or from that prisoner's failure to comply with reasonable rules for the maintenance and cleanliness of such facilities as cells, beds, cots, bunks, wash basins, showers and toilets.

II.

Defendants shall with all reasonable dispatch provide as follows with respect to all members of the plaintiff class.

1. Each prisoner shall be provided

with a clean cell, reasonably free of rodents, insects, and other vermin; provided, however, that defendants shall not be responsible for any condition which results from the deliberate act of the prisoner affected by the condition.

2. Defective or clearly inadequate existing heating, ventilating, and plumbing equipment and broken windows shall be repaired or replaced promptly unless the defect or need for repair or replacement results from any deliberate act of the prisoner or prisoners suffering from the defect or inadequacy.

3. At the time of each new occupancy, each cell used for administrative segregation shall be supplied with a bed, cot or bunk and a clean, untorn mattress, clean blankets, a properly functioning toilet, a properly

functioning sink with running water, and adequate lighting.

4. Prisoners shall be provided with appropriate materials in sufficient quantities to clean the cells respectively assigned to them.

5. No prisoner shall be involuntarily double-celled with another prisoner for more than 30 days in any 12-month period. Double-celling shall only occur in cells larger than 50 square feet, in which a second bed, cot or bunk is provided.

6. Clothing, underwear, bedding, linen and other laundry items shall be issued and exchanged no less often than is provided for general population inmates.

7. In accordance with the provisions of Cal.Adm.Code, Title 15, Section 3343(g), each prisoner shall be

permitted to shower at least three (3) times a week in a reasonably clean and sanitary shower facility.

8. The types and quantities of food served shall be the same as that which is provided for general population inmates except that a sack lunch is permitted. All food shall be prepared, stored, and served under sanitary conditions.

9. Unless precluded by temporary and compelling exigencies, each prisoner shall be provided with outdoor exercise at least one (1) hour every day or two (2) hours every other day, for a minimum total of eight (8) hours a week, or at least three (3) times a week, for a minimum total of ten (10) hours a week.

10. Prisoner shall be given reasonable opportunity to study law books, including, at a minimum, California appellate and United States

Supreme Court decisions from 1965 forward, relevant annotated California and Federal codes, legal reference books, and case digests.

11. In accordance with the provisions of Cal.Adm.Code, Title 15, Section 3343(f), prisoners shall be allowed visits from family members or friends with reasonable frequency and under minimum conditions of security consistent with safety.

12. Prisoners shall not be restricted unreasonably in sending and receiving personal mail, except that incoming packages may be limited in content to that property permitted in the segregated unit to which a prisoner is assigned.

13. Defendants shall provide adequate and competent medical, surgical, psychiatric and dental services to meet

the bona fide needs of prisoners. Defendants shall maintain adequate facilities and staff for such service. Emergency medical care shall be available at all times. Emergency dental and psychiatric care shall be provided on the same basis as for the general prison population.*/

III.

For the reasons detailed in the Findings of Fact and the Conclusions of Law, the relief granted in Wright v. Enomoto (N.D.Cal. 1976) 462 F.Supp. 397, 4040-405, failed adequately to correct defendants' arbitrary practices in imposing administrative segregation. Defendants shall therefore take immediate steps to provide safeguards to all members of the plaintiff class.

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*/ The provisions of this Paragraph 13 do not apply to any of the administrative segregation housing units at San Quentin, inasmuch as the quality of medical care at San Quentin has been or is being challenged on constitutional grounds in another lawsuit.

1. A prisoner shall be released from administrative segregation in a security housing unit[**/] at the expiration of his Minimum Eligible Release Date or at the expiration of

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[**/] As used in this Preliminary Injunction, "security housing unit" or "security housing" includes K-Wing at Deuel Vocational Institution, O-Wing at Soledad, Security Housing Units I, II, III (Adjustment Center, B Section and C Section) at San Quentin, so long as they remain so designated, and any other unit now or hereafter designated by defendants as a security housing unit. Condemned prisoners housed at San Quentin are not included under this injunction insofar as their classification and conditions of confinement are controlled by the Consent Decree entered by this Court on October 23, 1980 in Thompson et al. . Enomoto et al., No. 79-1630.

twelve (12) months of consecutive confinement in security housing units, whichever is shorter, unless, before said period expires, he is afforded all the hearing rights that attend a prisoner's initial placement in administrative segregation and defendants show at such hearing, on the basis of the prisoner's behavior, that his release would severely endanger the lives of inmates or staff or the security of the institution. Such behavior shall be factually documented or based on reliable information as set forth in this section. "Factual documentation" of misbehavior may be shown by the prisoner's behavior in prison within the prior five (5) years which has resulted in criminal convictions for escape, attempted escape, homicide or any assaultive crime; or by disciplinary offenses within the past twelve (12) months which involved the use or possession of a deadly weapon, physical assault, escape, attempted escape or possession of escape paraphernalia. "Reliable information" may be based upon a confidential source if disclosure of the source would endanger the safety of the source or endanger institutional security and provided that precautions, including the following, are taken to ensure the reliability of such information:

(a) As provided in Cal.Adm.Code, Title 15, Section 3321(b), the fact of a confidential source will be documented in the information given the inmate, and as much of the information received as can be disclosed without identifying the source will also be given the inmate. Any document relating information from a confidential source shall also include an evaluation of the reliability of the source, a brief statement of the reasons for the conclusions reached, and a statement of the reasons why the information or source is not disclosed.

(b) As provided in Cal.Adm.Code, Title 15, Section 3321(c), no decision in a hearing pursuant to this section may be based upon information from an undisclosed informant unless there is other written information which corroborates that received from the source or unless the circumstances surrounding the event and the known reliability of the source satisfy the hearing officer that the information is true.

"Reliable information" may also be based on any events that have occurred since the last due process hearing resulting in placement or retention in security housing that demonstrate that the prisoner is involved in or is planning activity which would threaten his own safety or the safety of others. "Reliable information" may also include information that a prisoner in a security housing unit will be killed or forcibly assaulted or will attempt a forcible escape, or that the prisoner himself will kill, commit a forcible assault, or will be the principal in a forcible escape attempt.

2. A prisoner shall not be involuntarily retained in any other administrative segregation unit unless, before the expiration of twelve (12) months of consecutive confinement, he is afforded all the hearing rights that attend a prisoner's initial placement in administrative segregation and unless at

this hearing defendants show that release of the prisoner from segregation would endanger the prisoner's own safety or the safety of others; or that release would jeopardize the integrity of an investigation into suspected criminal activity or serious misconduct. If the decision is based, in whole or in part, on gang membership, membership must be proven by reasonably convincing evidence of present and active allegiance to a gang.

IV.

Defendants shall provide a copy of this Preliminary Injunction to each member of the plaintiff class within ten (10) days hereafter and shall post a copy in each administrative segregation unit where it may be readily seen by class members.

V.

No person who has notice of this Preliminary Injunction shall fail to comply with the letter and spirit hereof nor shall any such person subvert the letter and spirit hereof by any sham, indirection or other artifice.

VI.

The Court retains jurisdiction to modify this injunction at any time and from time to time on its own motion or upon the motion of any party in the interest of effectuating its intendments and/or in the interest of furthering the ends of justice under all applicable law. Modification may include provision for appointment of a monitor, if necessary, to assure compliance with this Preliminary Injunction.

[February 21, 1978. Appeal from the United States District Court for the Northern District of California. Judgment Affirmed February 21, 1978. 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756]

Dissenting opinion by Mr. Justice Rehnquist, with whom the Chief Justice joins.

SUPREME COURT OF THE UNITED STATES

JIRO J. ENOMOTO, etc. et al., Appellants, vs. JAMES C. WRIGHT, et al.,	No. 77-504

Mr. Justice Rehnquist, with whom The Chief Justice joins, dissenting.

Appellants seek to appeal to this Court a decision of a three-judge District Court pursuant to 28 USC § 1253 [28 USCS § 1253]. That section provides for a direct appeal from any "suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." If no Act of Congress required a three-judge District Court to hear this suit, the decision cannot be appealed directly to this Court pursuant to § 1253 even though a three-judge court may have been in fact convened. Appeal lies instead to the United States Court of Appeal. Under such circumstances, we do not have jurisdiction to consider the appeal. Board of Regents v New Left Education Project, 404 US 541, 30 L Ed 2d 697, 92 S Ct 652 (1972); Moody v Flowers, 387 US 97, 18 L Ed 2d 643, 87 S Ct 1544 (1976); Phillips v United States, 312 US 246, 85 L Ed 800, 61 S Ct 480 (1941). Because I believe that no Act of Congress required a three-judge District Court in this case, I believe that the Court therefore errs in considering the merits of the appeal.

Appellee prisoners sued appellants, officials of the California prison system, in the District Court for the Northern District of California contending that constitutionally insufficient procedural safeguards are provided a prisoner who is placed into administrative segregation. A three-judge court was convened under 28 USC § 2281 [28 USCS § 2281] which at the time this action was filed provided for such a court whenever the constitutionality of a "State statute . . . or of an order made by an administrative board or commission acting under State statutes" is challenged.

It is the second clause of § 2281 that is relevant here since appellees challenge no state statute. The District Court based its jurisdiction on a presumed challenge to various regulations promulgated and issued by the Director of the Department of Corrections of the State of California. According to the District Court, these regulations are "formal orders of statewide application" and thus a challenge to their constitutionality provides jurisdiction under § 2281. Both because the regulations would not appear to be "order[s] made by an administrative board or commission" and because appellees would not appear to challenge the regulations, I do not believe that a three-judge District Court was required by § 2281.

"[T]he three-judge court statute is to be strictly construed." Board of Regents v New Left Education Project, supra, at 545, 30 L Ed 2d 697, 92 S Ct 652. Loose construction of § 2281 to require a three-judge court not only "entails a serious drain upon the federal judicial system" but also, inasmuch as direct review is in this Court, "defeat[s] the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket." Phillips v United States, supra, at 250, 85 L Ed 800, 61 S Ct 480. Section 2281 does not speak broadly in terms of "formal orders," as the District Court would assume. Instead, it requires a three-judge court to be convened only where a plaintiff challenges an "order made by an administrative board or commission." (Emphasis added.) Here, the orders allegedly under attack were issued by only one man, the Director of the Department of Corrections. While Congress could have given three-judge courts jurisdiction over orders issued by any state official, it did not. When Congress uses exact terms such as "administrative board" and "commission," it clearly does not intend to include state officials.

Even assuming that an order of a single state official can provide jurisdiction for a three-judge District Court here appellees' complaint does not bring into question the constitutionality of the regulations. As the District Court observed, the regulations provide for prior notice and a hearing "when possible"; these same regulations provide that an inmate should have the assistance of a caseworker or investigating officer when he is unable to prepare his own defense and should be allowed to testify and present documentary evidence; finally, a written statement of the outcome of the hearing is required.

Appellees presumably do not object to these procedural safeguards. Instead, they argue that these regulations are not strictly followed, and that wardens are constitutionally obligated to go even further than the regulations require and provide for additional procedural protections such as cross-examination.

There is no allegation that the regulations prohibit additional procedural safeguards. The rules, which are entitled "_General_ Procedures," simply provide an outline for the procedures to be followed when a prisoner is placed in administrative segregation. Presumably, each warden is free to supplement these minimum procedures as he sees fit. While wardens may be providing the minimum procedures with the acquiescence and even approval of the Director, the choice of procedures (beyond the minimum required by the regulations) remains that of the warden and does not bind any other prison in California. Under such circumstances, the regulations of the Director, even if an order of an "administrative board or commission," is not an order of "general application" and thus will not provide jurisdiction for a three-judge District Court. See Griffin v County School Board, 377 US 218, 12 L Ed 2d 256, 84 S Ct 1226 (1964).

Because a three-judge court was not required in this case, we do not have appellate jurisdiction and are not free to reach the merits. Board of Regents v New Left Education Project, supra, and cases cited therein. Under such circumstances in the past, we have vacated the judgment and remanded with instructions to enter a fresh decree so that appellants may, if they desire, perfect a timely appeal to the Court of Appeals. I would follow that course here.

[Sept. 30, 1976. Judgment Affirmed February 21, 1978. See 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756]

UNITED STATES DISTRICT COURT
N. D. CALIFORNIA

JAMES C. WRIGHT, JERRY LEE PENA, ROBERTO PABLO SALAS, MICHAEL S. GUILE, LOUIS X. RICHARDSON, ROBERTO FRIAS, Individually and on behalf of all others similarly situated,
Plaintiffs,

v.

JIRO J. ENOMOTO, Director of the Department of Corrections of the State of California, W.T. STONE, Superintendent of the California Training Facility at Soledad, JACOB GUNN, Warden of the California State Prison at Folsom, ROBERT REES, Warden of the California State Prison at San Quentin, and L.N. PATTERSON, Superintendent of the Deuel Vocational Institution,
Defendants.

No. C-73-1422
SAW

462 F.Supp.
397 (1976)

Before DUNIWAY, Circuit Judge, and WOLLENBERG and WEIGEL, District Judges.[*/]

WEIGEL, District Judge.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This action was brought by plaintiffs on behalf of themselves and the class of all male prisoners confined or subject to confinement in maximum security at four State of California prisons located, respectively, at San Quentin, Folsom, Soledad and Tracy. Defendants are the wardens of the prisons and the director of the Department of

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[*/] Honorable Ben C. Duniway, United States Circuit Judge for the Ninth Circuit, Honorable Albert C. Wollenberg, Senior United States District Judge and Honorable Stanley A. Weigel, United States District Judge, Northern District of California, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit.

Corrections.[1] The class, certified on February 25, 1976, is divided into three subclasses: (1) All prisoners confined and/or subject to being confined in maximum security units at the four institutions as a result of disciplinary procedures; (2) all prisoners so confined who have knowingly and voluntarily requested confinement in such units; and (3) all prisoners confined in such units or subject to being so confined who are not included in sub-class (1) or (2). This last sub-class includes those confined for so-called "administrative" reasons.

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[1] At the time the suit was filed, Raymond K. Procunier was the Director of Corrections and Louis S. Nelson was the Warden of the California State Prison at San Quentin. The former has since been replaced by Jiro J. Enomoto and the latter by Robert Rees. Under

(Footnote Continued)

The complaint alleges two causes of action. The first challenges the procedures resulting in confinement of inmates in maximum security units for "administrative" reasons. The second challenges conditions of confinement in the units.

[1] By the motions now before us, plaintiffs seek summary judgment and injunctive relief only on the first cause of action. They claim that defendants' applicable rules, practices and procedures violate the due process clause of the Fourteenth Amendment.[2/]

(Footnote Continued)

Fed.R.Civ.P. 25(d), they have been automatically substituted.

[2/] The rules are formal orders of statewide application. Hence the need for a three-judge court in this case. 28 U.S.C. § 2281 (1970); Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968).

(Footnote Continued)

Plaintiffs claim that defendants act arbitrarily in purporting to conform to their own standards for administrative segregation, i.e., that the inmate constitutes a danger to himself, or to other inmates, or to the staff.[3/] The main thrust of plaintiffs' claims lies in their allegations that, in purporting to apply the relevant standards, defendants have denied plaintiffs: Written notice of the charges against them; an opportunity to present witnesses and documentary evidence; an opportunity to

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(Footnote Continued)

Plaintiffs also allege that the rules violate Art. I, §§ 8 and 13 of the California Constitution. We do not reach that question.

[3/] We emphasize that the facts before us involve only transfer of prisoners from the general prison population to maximum security units for administrative reasons and confine our decision accordingly.

confront and cross-examine adverse witnesses; representation by counsel or counsel-substitute; and a written decision stating reasons for confinement in maximum security units. Plaintiffs seek injunctive relief requiring defendants to provide these procedural protections. They also seek expungement from their prison records of any reference to their confinement in maximum security units unless the decision leading to the confinement was made in accordance with the demanded procedures.

Plaintiffs have filed forty-seven affidavits from prisoners confined in maximum security segregation for administrative reasons. Those affidavits, which are not contradicted, establish the facts we now summarize.

A. The conditions in maximum security units

Prisoners in the maximum security units are confined in cells approximately five feet wide by eight feet long. The cells are without fresh air or daylight, both ventilation and lighting being poor. The lights in some cells are controlled by guards. It is difficult for prisoners to get needed medical attention. They must eat in their cells or not at all. They are allowed very limited exercise and virtually no contact with other prisoners. They cannot participate in vocational programs. They are denied those entertainment privileges provided for the general prison population. Parole is usually denied to them until after release from maximum security segregation.[4]

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[4] As one of the affidavits before us
(Footnote Continued)

It is clear, then, that a prisoner confined in a maximum security unit suffers a loss of liberty much more severe than that experienced by a prisoner in the general prison population. See Spain v. Procunier, 408 F.Supp. 534 (N.D.Cal. 1976); Clutchette v. Procunier, 328 F.Supp. 767 (N.D.Cal. 1971), aff'd, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (9 Cir. 1975), rev'd in part on other grounds, Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

(Footnote Continued)

aptly characterizes it, inmates confined in maximum security are "warehoused". The manner of confinement may cause permanent psychological, if not, indeed, physical damage. If prolonged, it may even destroy the capacity of prisoners to lead a normal life after release. Affidavit of Bernard L. Diamond.

B. The procedures used in ordering administrative segregation

A so-called Classification Committee in each institution is empowered to order prisoners transferred from the general prison population to maximum security for administrative reasons. The Committee is composed of the warden, two associate wardens, the chief psychiatrist, a program administrator and a correctional counselor. Any three members constitute a quorum. The warden has discretion to designate other members of the staff as permanent or temporary members. Defendants' Exhibit A, Department of Corrections Rules and Regulations, Ch. 4, filed February 1, 1976.

Defendants have consistently confined prisoners in maximum security segregation for administrative reasons without first giving them any meaningful hearing. Typically, the inmate is transferred to a maximum security unit before he is brought before the Classification Committee. In many cases, prisoners have been confined in solitary for days--sometimes for weeks--before any hearing. In some cases, inmates have been so confined and not told the reasons, even informally, until appearance before the Committee.

The vagaries and irregularities of defendants' practices are illustrated by the following excerpts from affidavits submitted by plaintiffs (all uncontradicted as noted earlier).

> On November 7, 1973, I was taken to North Segregation Unit . . . where I remained confined for about 2-1/2 months.

. . . . .

I have never been involved in violence or convicted of any crimes during my 32 months at San Quentin. . .

On November 7, 1973, I was taken from my cell in the Mainline to the North Segregation Unit for no reason at all. No formal charges were brought against me. I, along with other Black Muslims, who were also taken from the Mainline, was told that I was being confined . . . for "institutional convenience." We were told that we were becoming too militant; that we spent too much time in the yard by ourselves. . . .

On November 14th, one week after being sent to [maximum security], I met with the Classification Committee. . . . I was . . . told . . . that they would lock me up "until they figured out what to do with us". . . . I was

> not told anything more specific. The meeting with the Committee lasted about five minutes. . . .
>
> Affidavit of William E. X. Richmond, Plaintiffs' Exhibit 19.

* * * * *

In December of 1972 I was removed from an honor wing . . . and placed in [maximum security]. I was told by a two-man classification committee that I was a threat to other inmates and to myself, that they'd gone through my jacket [i.e. the affiant's prison records] and from my past record I appeared to be a threat. However, I was given nothing in writing. . . .

About mid-January of 1974, I went to a committee meeting which lasted about five minutes during which time I was simply told that I was a threat to maximum security. At that time, I had

had over a year clean time, that is, I had no prison disciplinary reports for that period of time. During this hearing, I had no opportunity to present any witnesses or any evidence in my own behalf, nor was I informed of what evidence the committee was using, except their telling me that it was in my jacket.

Affidavit of Stanley Baliel,
Plaintiffs' Exhibit 39.

* * * * *

On January 19, 1973, I was taken before the main disciplinary committee for a hearing under the allegation of possession and control of a contraband file. . . .

On January 28, 1973, I was taken before the Institution Classification Committee. . . . [The Committee] advised me that I was exonerated of implication or responsibility in the contraband file. . . .

[The Committee] nevertheless told me it was 'the desire of the committee' to further retain me in Security Housing Unit. When I inquired as to *why*; [sic] I was being retained in punitive segregation when, by the committee's own admission, I had *no* disciplinary infractions and had not exhibited any behavioral patters [sic] warranting or justifying punitive segregation. [I was told] that I was considered as an "influencial [sic] member of the Mexican Prison Community" and was "believed to have leadership qualities."

Affidavit of Roberto Pablo Salas, Plaintiffs' Exhibit 2 (emphasis in original).

* * * * *

While at Vacaville I was elected Chairman of Empleo, a Mexican-American organization aiming to achieve unity among Chicanos. After my transfer to Soledad I joined a Latin American culture group called C.A.U.S.A. ...

. . . . .

I was in the mainline at Soledad until September of 1972 when after two killings occurred, Soledad was locked down. Along with about fifty other Chicanos, I was taken to . . . the isolation wing. . . . I was never taken before any committee to answer any formal charges. The only reason given to me was that I was suspected of being a leader in Nuestra Familia.

. . . I was accused . . . of being the "Godfather" of that organization as reported by "reliable sources." I asked

> to confront my accusers but they were never brought forward. I am not now, and have never been associated with Nuestra Familia.
>
> Periodically, my classification would be reviewed. I was told that the only way I could get out of [maximum security] would be to prove that I was not affiliated with Nuestra Familia though I was never told how I should go about proving this. . . . In fact, [the Warden] even told me that he was aware that I was not a leader in Nuestra Familia but he still felt that I should be in [maximum security] because I was "influential" with The Family.

Affidavit of Roberto Frias,
Plaintiffs' Exhibit 5.

At the Classification Committee hearing, the inmate may be given a chance to respond to the charges then revealed to him for the first time. However, he is given no opportunity to call witnesses on his behalf nor to confront those who have given information against him. In fact, the sources and even the nature of the information are often not made known to him. Under these circumstances, all the inmate can do is make an unsupported denial of the charges against him. And no written reasons for the Committee's decisions are furnished.

In the face of the foregoing, the most that defendants have shown is that their rules and regulations purport to require that "when possible" prior notice be given of the proposed transfer into maximum security, a hearing be provided and a written statement of the outcome be given the inmate.[5] There is no definition of "when possible". Indeed, there is none as to what is or constitutes a "hearing". The rules do not require or permit the inmate to have counsel or counsel-substitute, nor do they permit him to call witnesses or confront adverse witnesses.[6] Defendants have made no showing that inmates confined in maximum security for administrative reasons are _in fact_ given prior notice, a hearing, and a written decision.

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[5] They do not require that a hearing be granted. They simply describe the procedures to be followed if hearing takes place. They are drafted in such a manner as to make it extremely difficult to determine which rules are presently in effect and what procedures must be followed. At oral argument, even counsel for defendants were unable to inform the court as to these matters.

[6] Chapter 4, Aticle 9, of the rules and regulations of the Director of Corrections provides:

> Classification actions that result in a substantial adverse effect on an inmate's conditions of confinement will require when possible advance written notice of the proposed action, a hearing, and a written

(Footnote Continued)

C. _The requirements of due process_

[2] To decide whether a state must afford procedural protections against arbitrary state action, the threshold question is whether a property or liberty interest protected by the Fifth and Fourteenth Amendments is at stake. _Board of Regents v. Roth_, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); _Morrissey v. Brewer_, 408 U.S. 471,

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(Footnote Continued)

statement of the findings.

We note again that neither "hearing" nor the words "when possible" are defined.

481-82, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

In recent cases dealing with due process claims by prisoners, the courts have recognized that

> though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] may not be deprived of life, liberty, or property without due process of law.

Wolff v. McDonnell, 418 U.S. 539, 555, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974).

[3] When a prisoner is transferred from the general prison population to the

grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons, there is severe impairment of the residuum of liberty which he retains as a prisoner--an impairment which triggers the requirement for due process safeguards. Clutchette v. Procunier, supra; United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), cert. denied, Guitierrez v. Dept. of Public Safety, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102 (1974); Allen v. Nelson, 354 F.Supp. 505 (N.D.Cal. 1973), aff'd, 484 F.2d 960 (9th Cir. 1973).

Defendants contend that these cases are no longer valid in light of two cases recently decided by the Supreme Court, viz., Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) and Montanye v. Haymes, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976). These decisions hold that a transfer of a prisoner from one institution to another does not impinge on a liberty interest protected by due process unless state law or practice makes such a transfer depend on proof of serious misconduct or the occurrence of other specified events. While the holdings do apply even if conditions in the prison to which the inmate is transferred are more onerous than those prevailing in the prison where he was previous confined, defendants err in claiming these decisions control the questions presented to us in this case.

Meachum and Montanye hold only that some discretionary decisions of prison officials, such as the decision to transfer a prisoner to another institution, do not result in such a substantial invasion of a prisoner's liberty interest as to trigger the need for due process protections. The Supreme Court explicitly stated that the transfer decisions did not result in confinement in maximum security segregation. Meachum v. Fano, supra, 427 U.S. at 219, 96 S.Ct. 2532; Montanye v. Haymes, id. 427 U.S. 236, 96 S.Ct. 2543. Contrary to defendants' contention, these opinions do not hold that a prisoner may be confined in maximum security segregation "for whatever reason or for no reason at all", regardless of the extent of the deprivation caused by such segregation.

> [Imposition of "solitary" confinement] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here . . . there should be minimum procedural

> safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.

Wolff v. McDonnell, supra, 418 U.S. at 571--72, n. 19, 94 S.Ct. at 2982.

[4] Moreover, Meachum and Montanye hold that if the state itself imposes limits on its discretion by conditioning decisions such as prison transfers on a specific standard being met, the state creates a liberty interest which is protected by due process. This is true whether the limits which the state imposes on itself stem from statute, rule or regulation. Meachum v. Fano, supra, 427 U.S. at 226, 96 S.Ct. 2532.

Here, defendants have limited the discretion of the classification committees by statewide regulations which define the circumstances under which an inmate may be confined in maximum security for administrative reasons. In its most recent version, Chapter 4, Article 6 of the rules and regulations of the Director of Corrections provides:

> § 3330. General Policy. (a) Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken. (Emphasis added.)[7]

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[7] This version of the regulation became effective on July 1, 1976. The prior version read:

> Inmates must be segregated from others when it becomes evident that they are a

(Footnote Continued)

[5] Thus, the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the standard set by the rules. We now consider what procedures are required.

[6] The Supreme Court has dealt with that question when state prison inmates are deprived of significant privileges or confined in maximum security for

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(Footnote Continued)

> menace to themselves or others, or to property or to the morale of the general population. Inmates may be segregated for medical, psychiatric, disciplinary or administrative reaons. . . . The reason for segregation of an inmate must be clearly documented by the official ordering the action, at the time such action is taken. Such action requires full classification committee review at the next regular meeting.

disciplinary reasons. Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In such cases, Wolff establishes that the prisoner must be given: An opportunity to appear before the decision-making body; written notice of the charge against him in advance of the hearing; an opportunity to present witnesses and documentary evidence "when [it] will not be hazardous to institutional safety or correctional goals"; a written statement of the reasons for the decision to punish him and of the evidence on which it is based; and, if he is illiterate or if the issues are complex, counsel-substitute (either a fellow inmate or a member of the prison staff) to help prepare his defense.

[7] Defendants have made no showing that prison administration or safety will be jeopardized if defendants are required to accord plaintiffs at least the minimal protections called for by Wolff in the case of disciplinary sanctions. These minimal protections are essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution and thereby to avoid subjection to the severe deprivations of confinement in maximum security. Indeed, defendants' interest in preventing prison violence may be well served by making fair procedures requisite to maximum security confinement. Plaintiffs have placed before us expert testimony--not contradicted indicating that implementation of fair procedures decreases tensions in prisons and eases

the work of prison administrators. Affidavits of John Boone, former Commissioner of Convictions for Massachusetts, and David Fogel, Executive Director of the Illinois Law Enforcement Commission, attached to Plaintiffs' Supplemental Response re Motion for Preliminary Injunction and Partial Summary Judgment filed February 18, 1976.

In holding that plaintiffs may not be confined in maximum security for administrative reasons unless they have been provided, minimally, with the safeguards required for such confinement for disciplinary reasons, we do not reach the question as to whether even more procedural protections must be required for such confinement for administrative reasons. The deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge. The latter is for a definite term, generally for a maximum of ten days. In contrast, administrative segregation is for an indefinite period--the prisoner may be confined for months, even years, without hope of release. The charges at a disciplinary hearing are definite and narrow. The inmate is accused of violating a prison rule. In contrast, as is evidenced by plaintiffs' exhibits, the charges at a hearing resulting in administrative confinement tend to be vague, and are frequently based on mere rumor, suspicion, or conjecture. In this connection we deem it appropriate to note that the circumstances and issues involved in decisions leading to administrative segregation may well, upon a proper showing, demonstrate the necessity for additional procedures to make hearings adequate.[8] See generally Tobriner & Cohen, How Much Process is "Due"? Parolees and Prisoners, 25 Hastings L.J. 801 (1974); Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); N. Morris, The Future of Imprisonment 30-34, 62-73 (1974).

However, on the basis of the record before us in this case, we are unable to find that all the relief sought by plaintiffs is constitutionally required insofar as it exceeds that required by Wolff. There is not sufficient evidence now before us in this case to show the effect such extensive procedural requirements would have on the administration of California prisons. Without such evidence, we are unable to determine with sufficient certainty "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

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[8] Defendants' rules provide that in disciplinary cases resulting in confinement in maximum security, the disciplinary committee must carefully evaluate information provided by secret informants, and must have evidence corroborating such information if it is relied upon. Those rules also require that in such cases a summary of the evidence obtained from the confidential source be given to the inmate if to do so will not reveal the source's identity. No such rules pertain to cases resulting in maximum security segregation for administrative reasons.

Should it appear that the relief we grant today fails adequately to correct defendants' arbitrary practices in imposing administrative segregation, plaintiffs are not foreclosed from seeking further relief consistent with valid correctional goals and prison safety requirements.

[8] We decline to order that defendants expunge references in prison records to findings that plaintiffs are not suited to be housed in the general prison population. We do not believe that it would be appropriate to require expungement in light of the burden it would place on prison officials. Wolff v. McDonnell, supra, 418 U.S. at 573-74, 94 S.Ct. 2963.

In the light of all the foregoing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment is granted;

IT IS FURTHER ORDERED that defendants, their agents, servants, employees, and all persons in active concert and participation with them be and are hereby restrained and enjoined from continuing to cause, authorize or permit transfers of prisoners from the general prison population not in maximum security housing units in order to segregate such prisoners for "administrative" reasons or purposes without first providing each such prisoner with the following procedural safeguards:

(1) written notice of the reasons in sufficient detail to enable the prisoner to prepare a response or defense, said notice to be furnished, except in case of genuine emergency, before initial placement in the maximum security unit, but, in any event, not more than forty-eight (48) hours after such initial placement;

(2) a fair hearing before one or more prison officials, said hearing to be held not less than seventy-two (72) hours after placement in the maximum security unit unless the inmate requests, in writing, additional time in which to prepare a defense;

(3) representation by counsel-substitute when prison officials determine that the inmate is illiterate or that the complexity of the issues makes it unlikely that he cannot collect and present the evidence

> necessary for an adequate comprehension of the case; determination and designation of counsel-substitute to be made at the time of the giving of the aforesaid notice; if counsel-substitute is not provided, the reasons must be stated in writing at the time of the hearing;
>
> (4) an opportunity to present witnesses and documentary evidence unless prison officials determine in good faith that permitting such evidence will be unduly hazardous to institutional safety or correctional goals;
>
> (5) a written decision including references to the evidence relied upon and the reasons for such confinement.

In the event of a continuing emergency, such as a prolonged riot, which, in the good faith determination of prison officials, prevents notice and hearing as required above, said notice and hearing must be provided as soon as is practical.

IT IS FURTHER ORDERED that plaintiffs and those members of sub-class (3) involuntarily confined for administrative reasons be immediately accorded the procedural safeguards hereinabove specified.

IT IS FURTHER ORDERED that within ten (10) days hereafter, defendants (1) provide a copy of this order to each prisoner confined in maximum security for administrative reasons and (2) post copies where they may be readily seen by all other members of the class.

[Filed December 31, 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph TOUSSAINT, et al., Plaintiffs-Appellees	No. 84-2833 No. 85-1507 No. 85-1878 No. 85-2526
v.	
Daniel McCARTHY, et al., Defendants-Appellants	D.C. No. CV 73-1422 SAW ORDER

Before WRIGHT, KENNEDY and BEEZER, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed January 12, 1987]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joseph TOUSSAINT, et al., Plaintiffs-Appellees/ Cross-Appellants, vs. Daniel McCARTHY, et al., Defendants-Appellants/ Cross-Appellees.	No. 84-2833 No. 85-1507 No. 85-1878 No. 85-2526 D.C CV 73-1422 SAW

APPEAL from the United States Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part, vacated in part and remanded.

Each party shall bear it own costs.

Filed and entered September 30, 1986.

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL STATUTES

42 U.S.C.§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

EXCERPT OF PLAINTIFFS' PETITION FOR REHEARING/ SUGGESTION OF REHEARING EN BANC

[filed October 14, 1986]

II. THE SEPTEMBER 30TH DECISION VACATING WRIGHT I ON THE GROUND THAT 15 CAL. ADMIN CODE § 3330 HAD BEEN REPEALED IS CLEARLY ERRONEOUS AS THE REQUIREMENTS OF SECTION 3330 REMAIN IN EFFECT.

The September 30th Panel concluded that the *Wright I* Court's holding that California had created a liberty interest in freedom from lock-up under 15 Cal. Admin. Code § 3330 is entitled to "no deference" because the regulation has been repealed. Slip Op. at 18. This conclusion, like the related conclusion that *Wright* I had been overruled, was clear error. Slip Op. at 17-18.

Section 3330 was "repealed," but the requirements therein relied upon in *Wright I* were renumbered after being substantially strengthened to further circumscribe prison officials in placing inmates in lock-up. The relevant standards remain in force. Hence, this basis for the September 30th Panel's decision is clearly erroneous.[1]

Wright I held that an "inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the standards set by the rules." Wright I, 462 F.Supp. at 403. At the time of the Wright I decision, section 3330 contained the following standard:

> Inmates must be segregated from others when it is reasonably

---

[1] In addition, the changes in the relevant state regulations had occurred prior to the Yockey decision, but the Yockey Panel did not address them as undermining Wright I. This presents yet another conflict between the panels.

> believed that they are a menace to themselves and others or a threat to the security of the institution. Id. at 403.

Similar standards have been preserved in the regulations since 1976. Indeed, subsequent amendments strengthen those standards and incorporate additional limitations.

On February 28, 1977, the Department issued a notice of proposed changes in section 3330 to "provide a due process similar to that used in disciplinary procedures when an inmate is segregated from the inmate general population for nondisciplinary reasons or pending disciplinary proceedings." Appendix A hereto. The amended version contained a stricter standard requiring a finding of an "immediate threat" to justify lock-up. Appendix B. The new regulation retained the requirement of clear documentation and incorporated procedural safeguards to limit arbitrary action. Appendix B. In 1978, the Department of Corrections repealed section 3330 and adopted a new version containing even greater limitations on the ability of prison officials to place and retain inmates in segregation. Appendix C.

In 1980, certain regulations (including section 3330) were repealed and readopted with new numbers. Although Article 6 of Subchapter 4 (§§ 3330-3337) was repealed "[t]he subject matter of this article [was] readopted under a separate article." Appendix D at p. 15, no. 11. The Department adopted Article 7 of Subchapter 4 to cover administrative segregation. This new article contained eleven sections (§§ 3335-3345), seven of which incorporated the provisions of former section 3330. Appendix D at p. 16, nos. 20-25. According to the

Department , "[t]he text of ... section [3335] is essentially the same as in existing section 3330(a) and (b)." Appendix D at p. 16, no. 19.

The requirements of former section 3330 are preserved and enhanced in the current sections 3335 through 3341 (*see especially* sections 3335 and 3339). Appendix E. The standards in the Department's regulations creating a liberty interest in freedom from segregation remain in force and are binding on defendants. *Clark v. Brewer*, 776 F.2d 226, 232 (8th Cir. 1985). Further, these regulations demonstrate, contrary to the September 30th decision, that *Wright I* remains entitled to full and complete deference.

③

No. 86-1587

Supreme Court, U.S.
FILED
MAY 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH TOUSSAINT, et al.,
Petitioners,

v.

DANIEL J. McCARTHY, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether summary affirmance vests in this Court exclusive and original jurisdiction to modify, after changes in the controlling law wrought by this Court or the repeal of pertinent state administrative regulations, an injunction which prescribes due process for state prison administrative segregation proceedings.

2. Whether the Court of Appeals' modification of a ten-year-old injunction prescribing procedures for state prison administrative segregation decisions to conform it to the minimum procedures prescribed by this Court in Hewitt v. Helms, 459 U.S. 460 (1983) was an abuse of discretion.

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No. 86-1587

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOSEPH TOUSSAINT, et al.,
Petitioners,

v.

DANIEL J. McCARTHY, et al.,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Daniel J. McCarthy, Director of the California Department of Corrections, Daniel Vasquez, Warden of San Quentin State Prison, and Robert Borg, Warden of Folsom State Prison, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.[1]

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[1] Respondents here are petitioners in No. 86-1588, in which a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was filed on March 30, 1987. Respondents urge this Court to deny the petition in this action, but assert that the issues they raise in No. 86-1588 warrant this Court's consideration.

That opinion is reported at 801 F.2d 1080 (9th Cir. 1986).

STATEMENT OF THE CASE

This civil rights action under 42 U.S.C. § 1983 concerns conditions and practices in administrative segregation housing units at San Quentin and Folsom State Prisons, the highest security housing units in two of California's maximum security state prisons. This action commenced in 1973, when prisoners housed in administrative segregation filed a civil rights complaint seeking improvement in their conditions of confinement.

In 1976, a three-judge district court issued the first significant ruling in this case, after adjudicating only administrative segregation procedures. In Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976), the three-judge court issued partial summary judgment after finding from declarations that the due process clause itself created a liberty interest in remaining in a prison's general population. Id. at 402. The Wright decision then required state prison officials to provide prisoners placed in segregation with the procedural safeguards required for prison disciplinary proceedings by this Court in Wolff v. McDonnell, 418 U.S. 539 (1974). Consequently, state prison officials were ordered to provide prisoners placed in segregation with the following: (1) prior, detailed written notice of the reasons for placement in segregation; (2) an adversarial hearing within seventy-two hours of the placement in segregation; (3) representation by counsel-substitute when appropriate; (4) an opportunity to present witnesses and documentary evidence; (5) a written decision including reasons for the placement in segregation and references to supporting evidence. Wright v. Enomoto, 462 F.Supp. at 404-405. This Court summarily affirmed this result in Enomoto

v. Wright, 434 U.S. 1052 (1978). Over respondents' objections, the three-judge court dissolved on March 14, 1980.

In 1983, the district court issued another preliminary injunction governing both conditions of confinement and administrative segregation placement procedures.[2] Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983). The preliminary injunction modified the Wright procedures and also applied them to administrative segregation retention decisions. Id. at 1386-1387. For the most part, the Ninth Circuit affirmed the preliminary injunction, but directed the district court, in passing on segregation prisoners' request for permanent injunctive relief, to reconsider its conclusion that the due process clause required the extensive Wright procedures for segregation decisionmaking in light of this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983). Toussaint v. Yockey, 722 F.2d 1490, 1494, n. 6 (9th Cir. 1984).

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[2] An earlier preliminary injunction governing conditions of confinement was issued by the district court in November 1980. The Court of Appeals vacated this injunction in March 1981. Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981).

Despite the Ninth Circuit's mandate, the district court continued and expanded even further the Wright procedures when it granted segregation prisoners permanent injunctive relief in October 1984. Toussaint v. McCarthy, 597 F.Supp. 1388, 1415-18 (N.D.Cal. 1984). The permanent injunction also required substantial improvements in the physical conditions in segregation housing units at San Quentin and Folsom.

The district court appointed a special master to oversee and report on compliance with its permanent injunction. The special master was also empowered to order the release of prisoners from segregation when he disagreed with prison officials' reasons for placing or retaining prisoners there. Id. at 1421-1426.

Prison officials appealed several provisions of the permanent injunction governing conditions, but their appeal focused on the extensive permanent procedural requirements for administrative segregation placement and retention decisionmaking and the assumption and delegation of power to order prisoners released from segregation. In essence, prison officials asked the Ninth Circuit to do what it had previously directed the district court to do--reexamine the Wright administrative segregation procedures in light of Hewitt.

The Ninth Circuit recognized its authority to review closely an injunction permanently controlling the operation of maximum security housing units in maximum security prisons to ensure that the injunction required no more of state prison officials than that needed to cure constitutional violations. Upon such review, the Court of Appeals conformed the permanent injunction's procedural safeguards to those required by this Court's decision in Hewitt. Toussaint v. McCarthy, 801 F.2d 1080, 1086-89, 1098-1101 (9th Cir. 1986).

The Court of Appeals ruled that it was appropriate to modify the injunction issued by the three-judge court in 1976, because this Court's more recent, reasoned opinion in Hewitt changed the applicable minimum requirements of due process, which previously had been taken from the summary affirmance of Wright. For this reason, the Ninth Circuit vacated the Wright order and the excessive procedural safeguards in the permanent injunction. Id. at 1114. The Court of Appeals also vacated the provision of the permanent injunction empowering the special master to order prisoners released from segregation. Id.

The prisoners then sought rehearing and rehearing en banc on issues similar to those raised here. The Ninth Circuit denied the prisoners' request for rehearing and suggestion for rehearing en banc on December 31, 1986. Not a single judge in active service requested a vote to rehear the case en banc.

REASONS FOR DENYING THE WRIT

I

THE NINTH CIRCUIT'S DECISION MODIFYING A PERMANENT INJUNCTION TO REFLECT INTERVENING CHANGES IN THE LAW CORRECTLY APPLIES CONTROLLING DECISIONS OF THIS COURT AND DOES NOT RAISE ANY IMPORTANT, UNRESOLVED ISSUE OF LAW. NO FURTHER REVIEW IS WARRANTED.

The prisoners' petition contends that significant issues requiring resolution by this Court are raised by the Ninth Circuit's modification of a permanent injunction controlling state prison officials' administrative segregation decisionmaking in light of intervening changes in the law. Since the Court of Appeals applied clearly established law to its review of the permanent injunction in this case, further review by this Court is not warranted.

As made clear by the Court of Appeals, it vacated the order of the three-judge district court in Wright v. Enomoto, 597 F.Supp. at 404-405, because intervening changes in the law required a different result from that ordered in Wright. Toussaint v. McCarthy, 801 F.2d at 1090-93. Those changes included this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), specifying the due process safeguards required for administrative segregation decisions, and repeal of a state prison administrative regulation upon which Wright in part had been predicated. 801 F.2d at 1090-92.

This Court has made it clear that permanent injunctions are always subject to modification as intervening events may dictate. United States v. Swift & Co., 286 U.S. 106, 114-115 (1932). A change in the law is one event that may warrant modification of a permanent injunction. System Federation No. 91 v. Wright, 364 U.S. 642, 647-48 (1961).

The prisoners claim, however, that this Court's summary affirmance of Wright precluded review of that order in light of the changes in the law noted by the Court of Appeals. The prisoners make this claim even though it is clear that the more recent and carefully reasoned decision in Hewitt, not the summary affirmance of Wright, specifies what due process must attend application of a state standard for removal of a prisoner from the general population to segregation. Thus, the prisoners contend that summary affirmance of Wright rendered the Court of Appeals powerless to conform lower court orders to the Constitution. Their contention would insulate the orders of the single district judge from any review by the Court of Appeals or impose on this overburdened Court the obligation of direct review.

The prisoners' contention overlooks the fact that summary affirmance of Wright did not signal this Court's agreement with the reasoning of the three-judge district court, Zobel v. Williams, 457 U.S. 55, 64, n. 13 (1982), or give any indication about its rationale for the affirmance, Mandel v. Bradley, 432 U.S. 173, 176 (1977). Also, the prisoners fail to recognize that, because of the summary affirmance of Wright, it was not at all unusual for this Court to give full consideration to the question of the extent of due process for administrative decisions in Hewitt. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476, n. 20 (1979).

Despite this Court's plenary consideration of this question in Hewitt, the prisoners suggest that the Court of Appeals' application in this case of Hewitt, instead of the three-judge court's earlier decision in Wright, raises serious questions about the law of the case doctrine. The prisoners' concerns are misplaced.

As this Court has recognized, law of the case is an amorphous concept. This doctrine generally requires a court to continue to apply an earlier rule of law throughout a case. Arizona v. California, 460 U.S. 605, 618 (1983). Law of the case is an expression of the general practice of courts to refuse to reopen what has already been decided. Messinger v. Anderson, 225 U.S. 436, 444 (1912). The law of the case doctrine is not a limit on a court's jurisdiction. This doctrine does not preclude a court from reconsidering a question once decided. Arizona v. California, 460 U.S. at 618; Southern Ry. Co. v. Clift, 260 U.S. 316, 319 (1922). As the Ninth Circuit recognized, this is especially true in the case of a permanent injunction involving the day-to-day operation of a state prison system. Thus, in light of subsequent changes in the governing law, the law of the case doctrine did not prohibit the Court of Appeals from following Hewitt instead of the summary affirmance of Wright.

Though amorphous, the law of the case doctrine has been discussed extensively by this and other courts. The Ninth Circuit's application of the well-developed law of the case principles to this case does not raise any important, unresolved question of federal law. Similarly, the Ninth Circuit's modification of the permanent injunction in this case in light of changes in the controlling law also does not raise any important, unresolved question of federal law requiring this Court's consideration. For these reasons, the petition for writ of certiorari should be denied.

II

THE COURT OF APPEALS' DECISION ABOUT THE DUE PROCESS REQUIREMENTS FOR ADMINISTRATIVE SEGREGATION PLACEMENT DECISIONS DOES NOT RAISE ANY ISSUE UNRESOLVED BY RECENT DECISIONS OF THIS COURT OR CONFLICT WITH ANY DECISION OF OTHER CIRCUIT COURTS OF APPEALS.

The prisoners' petition asserts that the Ninth Circuit's decision about the due process requirements for administrative segregation placement decisions creates a need for clarification of this Court's decisions in Hewitt v. Helms, 459 U.S. 460 (1983) and Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. ____, 105 S.Ct. 2768 (1985). The prisoners' assertion is wrong.

In determining the quantum of due process required for administrative segregation placement decisions, the Court of Appeals in this case followed the path outlined by this Court in Hewitt. First, the Ninth Circuit considered whether California prisoners enjoyed a state-created liberty interest in remaining in the general population. Toussaint v. McCarthy, 801 F.2d at 1089-98. When the Court of Appeals decided that state prison regulations created a liberty interest entitled to federal due process protection, id. at 1097-98, it then determined the quantum of process required by the Fourteenth Amendment to protect that interest, id. at 1009-1101. This was exactly the reasoning process used by this Court in Hewitt.

Not surprisingly, the Ninth Circuit ruled that California prisoners placed in segregation were entitled to the same measure of due process granted the Pennsylvania prisoners by this Court in Hewitt. 801 F.2d at 1099-1101. The California prisoners argue here, however, that Hewitt should not have governed the Ninth Circuit's analysis, because, they say, this case is factually different from Hewitt. The prisoners made similar claims below, where the Ninth Circuit disposed of them appropriately. Id. at 1099-1100. The prisoners' efforts to inflate these perceived factual differences into important, unresolved issues of law should be rejected out of hand. There is no need to grant a writ of certiorari when the Court of Appeals applied and followed a recent and unmistakably clear decision by this Court, Hewitt, in reaching its decision in this case.

The prisoners' attempt to create a conflict between this Court's decision in Hill and the Ninth Circuit's decision about the standard for judicial review of state prison officials' administrative segregation decisions evinces a serious misapprehension of Hill and of the dictates of federal due process. The prisoners argue that the Hill "some evidence" standard of judicial review of prison disciplinary proceedings was incorrectly applied by the Ninth Circuit to judicial review of prison officials' administrative segregation decisions. Their argument misses two important points.

First, Hill concerns the standard of judicial review of prison disciplinary proceedings required by the due process clause when loss of sentence reduction credits is involved. 105 S.Ct. at 2770, 2773. As even a cursory review of Wolff v. McDonnell, 418 U.S. 539 (1976) and Hewitt shows, the liberty interest in prison disciplinary proceedings likely to result in a loss of sentence reduction credits is entitled to much more due process protection than is a state-created liberty interest in remaining in a prison's general population, because the stakes are higher. The former involves the duration of imprisonment, and the latter involves only placement within a prison. It follows, therefore, that the standard of judicial review of administrative segregation decisions should not be more stringent than the standard used for review of prison disciplinary proceedings resulting in the loss of sentence reduction credits. The prisoners simply have no reason to complain about the Ninth Circuit's application of the Hill standard of judicial review to state prison officials' segregation decisions.

Second, the prisoners overlook the fact that, in reviewing prison disciplinary proceedings, courts measure a factual determination with the some evidence standard. As this Court recognized in Hewitt, however, a decision to segregate a prisoner is based largely on subjective factors, "which are singularly unsuited for 'proof' in any highly structured manner." 459 U.S. at 474, 476, n. 9. For this reason, application of the Hill standard to segregation decisions substantially benefits, not harms, segregation prisoners.

The prisoners finally contend that the Court of Appeals' decision about the quantum of process due a California prisoner placed in segregation conflicts with the Eighth Circuit's decision in _Clark v. Brewer_, 776 F.2d 226 (8th Cir. 1985). Their claimed conflict does not withstand scrutiny, because it confuses the Ninth Circuit's decision about due process for segregation placement decisions with an Eighth Circuit decision about due process for segregation retention decisions.

The thrust of the prisoners' contention here is that the Ninth Circuit erroneously limited due process requirements for segregation placement decisions to those required by _Hewitt_, because of claimed factual differences between that case and this case. In _Clark_, however, the plaintiff did not challenge his original placement in segregation. _Clark v. Brewer_, 776 F.2d 229-30. Rather, the prisoner in _Clark_ claimed that once placed in segregation he was entitled to periodic review of his segregation status. _Id_.

The Eighth Circuit agreed and specified some generally informal, nonadversarial procedures for use in segregation retention decisions. 776 F.2d at 233-35. Thus, all of the prisoners' claimed conflicts (Petition, pp. 41-44) concern the purported differences between the procedures promulgated by this Court in Hewitt and the Ninth Circuit in this case for administrative segregation placement decisions, and the Eighth Circuit's procedures for segregation retention decisions.

Moreover, the Ninth Circuit agrees with the Eighth Circuit's conclusion that periodic review of segregation decisions is constitutionally required. Toussaint v. McCarthy, 801 F.2d at 1101. The Ninth Circuit, however, has not specified procedures for these periodic reviews, because it remanded that matter to the district court. Id. at 1101. The supposed conflict raised by the prisoners is thus not ripe for review. For these reasons, there is no conflict between the Ninth Circuit's decision in this case and the Eighth Circuit's decision in Clark. Any conflict claimed by the prisoners here is simply a product of their misreadings of these cases.

CONCLUSION

For these reasons, the prisoners' petition for writ of certiorari should be denied.

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SF73CX7094

Supreme Court, U.S.
FILED
MAY 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1587

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

JOSEPH TOUSSAINT, et al.,
Petitioners,
vs.
DANIEL J. McCARTHY, et al.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Defendants-Respondents have opposed Plaintiffs-Petitioners' Petition for Writ of Certiorari. In doing so, they ask this Court to ignore the history and context of this nearly fourteen year old prison conditions lawsuit, that are so essential to framing the questions of law.

1. The context of this case includes this Court's summary affirmance of a three judge district court's entry of partial summary judgment in this very case, Wright v. Enomoto, 462 F.Supp. 397 (N.D.Ca. 1976 Three Judge) (App. 549), summarily aff'd, 434 U.S. 1052 (1978) (App. 540). That decision has now been vacated by the Ninth Circuit, Toussaint v. McCarthy, 801 F.2d 1080, 1091-93, 1114 (App. 34-40, 144-45) (9th Cir. 1986). Yet Wright has never been overruled by this Court and was recently cited by the Court in Hewitt v. Helms, 459 U.S. 460, 469 (1983)), the case upon which the Ninth Circuit most relied to vacate Wright.

Thus, the first question before this Court is the authority of a lower federal court to vacate a partial summary judgment that this Court has summarily affirmed. It is not, as defendants argue, simply whether the Ninth Circuit was permitted within the "law of the case" and the "charged circumstances" doctrines to alter the permanent injunction to conform to current legal standards. Defendants-Respondents Brief in Opposition at 8-13 (hereinafter "Respondents' Opposition").

In other cases involving the interpretation by lower courts of summary affirmances by the Court, the summary affirmances were of judgments in cases other than the ones being decided. By contrast, plaintiffs' Petition for Writ of Certiorari raises the issue of the authority of a Court of Appeals to second guess and vacate a summary affirmance in the very case in which it was entered by this Court. Thus none of the cases cited by the defendants involved similar facts or the same context as presented here. See Defendants' Opposition at 11, citing Zobel v. Williams, 457 U.S. 55, 64 n.13 (1982); Mandel v. Bradley, 432 U.S. 173, 176 (1977)); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979).

This Court did, however, provide clear guidance on the question presented here in Mandel, holding that:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.
>
> 432 U.S. at 176.

This Court should grant the Petition for Writ of Certiorari to give further guidance to the lower federal courts as to their obligations in dealing with summary affirmances by this Court.

2. The context and history of this case also include the significant facts that:

(1) the conditions in which inmates have been confined in the San Quentin and Folsom lock-up units have violated constitutional minima for more than fourteen years;

(2) on appeal the defendants did not contest the district court's findings of fact as to the long standing unconstitutionality of those conditions;

(3) despite ample opportunities to do so, the defendants systematically failed and refused to cure these unconstitutional lock-up conditions;

(4) the district court correctly found that the defendants frequently place and retain inmates in their unconstitutional lock-up units indeterminately (often for

years) as well as unjustifiably and arbitrarily;

(5) the defendants have persistently violated injunctions, the first of which was entered in 1976 and which were designed to control unjustified, arbitrary and capricious placement and retention in cruel and unusual lock-up conditions.

Nowhere in their Opposition do the defendants address this context and history, except to say that the plaintiffs seek "to inflate these perceived factual differences [from those in Hewitt v. Helms, 459 U.S. 460 (1983)] into important, unresolved issues of law...." Respondents' Opposition, at 16. However, it is plain that the uncontested record in this case places before this Court very important issues of a district court's authority to fashion a meaningful remedy in a civil rights prison conditions action brought under 42 U.S.C. § 1983. Those issues are not answered, as Respondents argue (Opposition at 14-18), by reference to two decisions of this Court, Hewitt and Superintendent Mass. Correctional Institution v. Hill, 472 U.S. _____, 86 L.Ed.2d 356 (1985).

Hewitt and Hill decided only issues of procedural due process. See Petition at 29-40. The issues here, by contrast, involve important unresolved questions of a district court's authority in a case where uncontested violations of the Eighth Amendment exist, and where prior court orders have been ignored.

This Court has often held that the district courts have full authority to impose comprehensive remedies to assure elimination of unconstitutional acts and effective enforcement of their orders.

Hutto v. Finney, 437 U.S. 678 (1978); United States v. Paradise, 480 U.S. _____, 94 L.Ed.2d 203 (1987). See also Hewitt, supra, 459 U.S. 460, 468; id. at 481 n.4 (Stevens, J., dissenting). For good reason, defendants ignored these principles and cases in their Opposition.

Simply put, the question to be considered in the context of this case is the scope of the district court's remedial powers when prison authorities have long operated admittedly unconstitutional lock-up units and persistently violated the trial court's corrective orders. This Court should grant Plaintiffs' Petition for Writ of Certiorari to clarify whether and to what extent the Court's decisions in Hewitt and Hill qualify the district court's remedial powers in such circumstances.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: May 8, 1987